Supreme Court of the United States

OCTOBER TERM, 1926.

No. 482.

HENRY W. MCMASTER and FRANCIS H. SKELDING, as Receivers of the Wabash Pittsburgh Terminal Railway Company,
Petitioners,

against

GEORGE J. GOULD; KINGDON GOULD and SCHUYLER NEILSON RICE, as Executors of the Estate of George J. Gould, deceased,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

PETITIONERS' BRIEF.

The History of the Action.

The petitioners brought an action in the Supreme Court of New York on September 26, 1910, against George J. Gould and others, as managers and trustees of the Pittsburgh and Toledo Syndicate, for an accounting of funds received by them for the use of the Wabash Pittsburgh Terminal Railway Company, a large part of which the petitioners claimed was not devoted to the use for which

they were intended (*Rec., fols.* 94b-95m). The defendant Gould appeared in the action and interposed an answer (*Rec., fol.* 96yy). In due time the issues were tried at Special Term before Mr. Justice Finch. A great mass of testimony and exhibits was introduced in evidence by the respective parties (*Rec., fols.* 33-36, 64-65). Gould was sworn as a witness on his own behalf at considerable length and was interrogated in regard to all of the matters in issue (*Rec., fols.* 36, 72).

The taking of the testimony was completed with the exception of that of one witness whom the defendants expressed their intention of calling and who was prevented from testifying at the trial because of his illness. This led to a postponement at the defendants' instance. The taking of the testimony of this witness was delayed by defendants' counsel, and before the case could be finally submitted, Mr. Justice Finch was assigned to the Appellate Division of the Supreme Court. Under a provision of the New York Constitution, this automatically disqualified him from taking further action in the case and a mistrial resulted (*Rec., fols.* 65-66).

Several attempts were made to retry the case before another Justice, but, owing to the illness of defendants' trial counsel, further postponements were necessitated (*Rec., fol.* 66).

On May 16, 1923, the defendant George J. Gould died, he being at that time a resident of New Jersey (*Rec., fol.* 35). On June 4, 1923, his last will and testament was admitted to probate in Ocean County, New Jersey, and letters testamentary were issued to his son, Kingdon Gould, and to Schuyler Neilson Rice, the respondents (*Rec., fols.* 35-36).

The testator had for thirty-five years maintained offices in the City of New York, where he transacted business in person (*Rec., fols.* 74-75). He also occupied a house in

that city with his family. He was connected in an official capacity with important corporations which had their offices and principal places of business in New York (*Rec., fol.* 77).

Kingdon Gould has a residence at No. 160 East 72nd Street, in the City of New York, but claims that his legal residence is in New Jersey. Mr. Rice resides in New Jersey. The executors now occupy the offices formerly occupied by their testator at 165 Broadway, New York City (*Rec., fols.* 79-81).

The only surviving defendant in this action is Myron T. Herrick, who is a resident of Ohio. None of the other defendants named in the complaint was ever served with process in the action, one of them, Mr. Ramsay, being at the time of his death a resident of Pennsylvania and the other, Mr. Hyde, residing in France (*Rec., fol.* 82).

The First Attempt to Revive the Action.

Upon the death of Gould, the petitioners sought to revive the action and to make his executors defendants in his stead. They were met by the claim that the action could not be thus revived and that Section 160 of the Decedents' Estate Law of New York did not authorize such proceedings. The Appellate Division of the First Department so held and certified the question arising under that section of the statute to the Court of Appeals.

The question so certified read as follows:

> "*Did the Court at Special Term have power* to substitute the executors of the last will and testament of George J. Gould, deceased, appointed by the Orphans' Court of New Jersey, where his will was probated, as parties defendant herein without their consent, in place of their testator, pursuant to the proceedings instituted by the plaintiffs herein

for that purpose, and to revive as against the executors this action, which at the time of testator's death was pending in the Supreme Court of this State?"

The Court of Appeals, on January 21, 1925, answering the question certified in the negative, affirmed the order of the Appellate Division (239 N. Y. 606).

At the time of the institution of those proceedings Section 160 of the Decedents' Estate Law provided:

> "§ 160. *Foreign executor or administrator may sue or be sued.*
>
> An executor or administrator duly appointed in any other state, territory or district of the United States or in any foreign country may sue or be sued in any court in this state in his capacity of executor or administrator in like manner and under like restrictions as a non-resident may sue or be sued, if, within twenty days after any such executor or administrator shall commence, or appear in, any action or proceeding in any court in this state or within twenty days after he shall be required or directed by summons or otherwise to appear therein, there shall be filed in the office of the clerk of the court, in which such action or proceeding shall be brought or be pending, a copy of the letters testamentary or letters of administration issued to such executor or administrator duly authenticated as prescribed by section forty-five of this chapter; in default whereof all proceedings in such action or proceeding may be stayed until such duly authenticated copy of such letters shall be so filed."

Thereafter, Chapter 253 of the New York Laws of 1925 was enacted on April 1, 1925. By its terms a new subdivision was added to Section 160 of the Decedents' Estate Law, reading as follows (*Rec., fols.* 43-45):

> "2. *An action or proceeding pending in any court of this state in which the court shall have*

obtained jurisdiction of the person of a defendant or respondent who is domiciled in any other state, territory or district of the United States or in any foreign country shall, if the cause of action survives, not abate by reason of the death of such defendant or respondent, but his executor or administrator duly appointed in such state, territory or district of the United States or foreign country, shall, upon the application of the adverse party, and upon such notice as the court may prescribe, be brought in and substituted in the place of the decedent and the action or proceeding shall continue.

Sec. 2. This act shall take effect immediately."

A motion for reargument was then made on the strength of this statute, and the motion being granted (240 N. Y. 641), a reargument took place. The Court, however, adhered to its order *upon the ground that it could only review the question as certified, and no other, and that the newly enacted statute had not been, as it could not have been, considered by the Appellate Division, because it was not enacted until after the certificate had been made* (240 N. Y. 379).

The Present Proceeding to Revive.

Thereupon, on October 9, 1925, this proceeding was commenced under Chapter 253 of the Laws of 1925 by the service of an order to show cause granted by Mr. Justice Proskauer, one of the Justices of the Supreme Court of the State of New York. This order to show cause and the affidavits upon which it was granted were served, as directed in the order to show cause, by mail upon the executors of George J. Gould, deceased, to-wit: upon Kingdon Gould at 160 East 72nd Street, New York City; upon Schuyler Neilson Rice at 17 Adelaide Avenue, Highland

Park, New Brunswick, New Jersey; upon both executors at the office maintained by them at 165 Broadway, New York City, and upon the attorneys of George J. Gould, deceased, who represented him in this action prior to his death, at their offices at No. 120 Broadway, New York City (*Rec., fols.* 8-9, 87-94, 105-106, 126-127). The same attorneys who represented Mr. Gould upon the trial of this action, appeared specially and represented the executors in these proceedings.

The order of Mr. Justice Proskauer dated October 9, 1925, directed Kingdon Gould and Schuyler Neilson Rice, as executors of the Estate of George J. Gould, deceased, to show cause why an order should not be granted substituting them as such executors, and the Estate of George J. Gould, deceased, in his place and stead, and why they should not be brought in as defendants herein and why this action should not be revived against the said executors and the Estate of said George J. Gould, deceased (*Rec., fols.* 24-25).

On October 24, 1925, the executors of George J. Gould, deceased, appearing specially and solely for the purpose of the motion, served a cross-notice of motion asking that the service of the order to show cause dated October 9, 1925, be vacated and set aside on the grounds that the Court had no jurisdiction over the executors of the Estate of George J. Gould, deceased, or over any of the assets of the estate.

By its resettled order dated November 2, 1925, entered in the office of the Clerk of the County of New York on November 16, 1925, the Special Term of the Supreme Court denied the motion of petitioners to substitute the executors of George J. Gould, deceased, and to revive the action against them, granted the motion of the executors of George J. Gould, deceased, and vacated and set aside the service of the order to show cause dated October 9, 1925,

> *"upon the sole ground that Chapter 253 of the Laws of 1925, upon the authority of which this proceeding was brought, is unconstitutional and null and void in that the constitutional requirement of the 14th Amendment to the Constitution of the United States of due process of law precludes the legislature from providing generally for continuing actions for judgments in personam against foreign executors or administrators of deceased defendants"* (*Rec., fols.* 18-19).

From this order, petitioners appealed to the Appellate Division of the Supreme Court, First Department, where the order of the Supreme Court, New York County, was affirmed, without opinion, by order dated January 29, 1926 (*Rec., fol.* 77). Petitioners then applied to the Appellate Division, First Department, for leave to appeal to the Court of Appeals. The motion was denied by the Appellate Division (*Rec., fols.* 78-79). On February 23, 1926, petitioners, out of abundance of caution, appealed to the Court of Appeals from the order of the Appellate Division (*Rec., fols.* 80-81). The Court of Appeals, without opinion (242 N. Y. 604), dismissed the appeal on May 14, 1926, and an order was accordingly entered upon the remittitur of the Court of Appeals in the office of the Clerk of the County of New York on May 28, 1926, where the record in these proceedings is now lodged (*Rec., fols.* 84-87).

Question to be Adjudicated.

The sole question to be determined is, whether the Courts of New York erred in deciding that this action cannot be revived under Chapter 253 of the New York Laws of 1925 on the ground that it violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

POINTS.

I.

Chapter 253 of the Laws of 1925 does not infringe any provision of the Federal Constitution. It does not deprive the New Jersey executors of George J. Gould of due process of law within the meaning of the Fourteenth Amendment.

(1) *The action instituted against George J. Gould to require him to account as a trustee and as one of the managers of the Pittsburgh and Toledo Syndicate survived upon his death and is enforceable against his personal representatives.*

Hazard v. *Durant*, 19 Fed. Rep. 417.
Allen v. *Luke*, 163 Fed. Rep. 1018.
Dodd v. *Wilkinson*, 41 N. J. Eq. 566.
O'Brien v. *Blaut*, 17 App. Div. 288.
Pierson v. *Morgan*, 52 Hun 611; 17 Civ. Pro. Rep. 124; aff'd 121 N. Y. 705.
Wineburgh v. *United States R. R. Adv. Co.*, 173 Mass. 60.
Lovejoy v. *Bailey*, 214 Mass. 134.
Harrigan v. *Gilchrist*, 121 Wis. 127.
Section 82, New York Civil Practice Act.

(2) *Since the cause of action against Gould survived and did not abate in consequence of his death, the petitioners were entitled to revive the action against his personal representatives by proceedings which were merely a continuation of the old suit.*

As long ago as in *McKnight* v. *Craig*, 6 Cranch. 187, Chief Justice Marshall, in a proceeding by *scire facias* to

revive an action against the personal representatives of a deceased defendant, said *"that it is not to be considered as a proceeding against the representatives of the deceased, but a continuance of the original action."* For that reason, it was held that a plea which could not have been set up in the original action was bad.

In *Clarke* v. *Mathewson,* 12 Pet. 163, a bill was filed by Wetmore, a citizen of Connecticut, against Mathewson and others, citizens of Rhode Island, in the United States Circuit Court for the District of Rhode Island. An answer was interposed and the cause was referred to a master for an accounting. Pending these proceedings the complainant died. Administration of his effects was granted to Clarke, who filed a bill of revivor in the Circuit Court. The laws of Rhode Island did not permit one residing out of the State to take out administration of a deceased person within the State, and made such administration indispensable to the prosecution and defense of any suit in the State in the right of the estate of the deceased. It was held that the bill of revivor was in no just sense an original suit; that the parties to the original suit were citizens of different States and the jurisdiction of the Court completely attached to the controversy, and having so attached, it could not be divested by any subsequent proceedings. Mr. Justice Story, in the course of his opinion, said:

> "The death of either party, pending the suit, does not, where the cause of action survives, amount to a determination of the suit. It might, in suits at common law, upon the mere principles of that law, have produced an abatement of the suit, which would have destroyed it. But in courts of equity, an abatement of the suit, by the death of a party, has always been held to have a very different effect; for such abatement amounts to a mere suspension,

> and not to a determination, of the suit. It may again be put in motion, by a bill of revivor, and the proceedings being revived, the cause proceeds to its regular determination, as an original bill. *The bill of revivor is not the commencement of a new suit, but is the mere continuation of the old suit.*"

This principle was recognized in the Judiciary Article in 1789. Section 955 of the United States Revised Statutes is a re-enactment of the original provision. This constitutes a persuasive practical interpretation of the Constitution by men who took a leading part in the framing and adoption of the first ten Amendments to the Constitution. It provides:

> "When either of the parties, whether plaintiff or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such action to final judgment. The defendant shall answer accordingly; and the Court shall hear and determine the cause and render judgment for or against the executor or administrator as the case may require. And if such executor or administrator, having been duly served with a *scire facias* from the office of the clerk of the court where the suit is depending, twenty days beforehand, neglects or refuses to become party to the suit, the Court may render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid, shall upon motion to the Court, be entitled to a continuance of the suit until the next term of said court."

The amendment of this section by Joint Resolution of December 22, 1921 (Fed. Stat. Ann., 1921 Supp., p. 236), is significant.

(3) *Since a proceeding to revive an action against a deceased defendant and to bring in his executors does not constitute the commencement of a new action, but merely the continuance of one actually pending at the time of death, a proceeding such as that now under consideration constitutes due process, although the persons sought to be brought in are non-residents of the State in which the action is pending.*

In this case, George J. Gould was properly brought before the Supreme Court of New York. It had jurisdiction not only over his person, but also over the subject-matter. His death did not oust it of jurisdiction, for the cause of action survived. Action was merely suspended until his executors could be brought before the Court. At the time of his death the New Jersey Statute of Limitations would have barred an action or proceeding in the courts of that State against him (*Rec., fols.* 94xx-94yy).

If, under the circumstances, the Courts of New York are precluded by the Fourteenth Amendment from proceeding with this action because the testator at the time of his death was domiciled in New Jersey, where his will was probated and his executors reside, then the petitioners will have been deprived of all remedy on a meritorious cause of action which survives but cannot under the circumstances be revived and continued against the testator's executors. That would be most unjust and unreasonable.

The situation here is very similar to that considered in *Nations* v. *Johnson,* 24 How. 195. There, an action had been brought in the Chancery Court of Mississippi and a judgment was rendered from which an appeal was taken to the Court of Errors and Appeals of the State. The defendant-in-error was a non-resident and had no attorney of record in the State. These facts being brought to the attention of the appellate court, an order was made to the effect that unless the defendant-in-error appeared at a

time stated, the Court would proceed to hear and determine the cause in the same manner as if process had actually been served, and the publication of a copy of the order in a specified public newspaper was directed. That having been done, the Court, in default of appearance by the defendant-in-error, proceeded to reverse the decree of the court of first instance. The validity of that judgment was subsequently called into question, and was sustained by this Court, Mr. Justice Clifford saying:

> "Personal service was made upon the defendants in this case by due process of law in the court of original jurisdiction, and the question here is, whether a party duly served with notice in a subordinate court, after he has appeared and answered in the suit, and secured an erroneous judgment in his favor, may voluntarily absent himself from the jurisdiction of the appellate tribunal, so as to render it impossible to give him personal notice of an appeal, and still have a right to complain that notice was served by publication, pursuant to the law of the jurisdiction from which he has thus voluntarily withdrawn. We think not. To admit the proposition would be to deprive the other party of all means of removing the cause to the appellate tribunal, and would enable a party, who knew he had wrongfully prevailed in the court below, to secure the fruits of an erroneous judgment, by defeating the jurisdiction of the appellate court. Actual notice ought to be given in all cases where it is practicable, even in appellate tribunals; but whenever personal service has been rendered impossible by the removal of the appellee or defendant in error from the jurisdiction, service by publication is sufficient to give the appellate tribunal jurisdiction of the subject and the person, provided it appears in the record that personal service was given in the subordinate court, and that the party there appeared, and litigated the merits of the controversy. * * * *Plainly, therefore, there is a distinction between a writ of error and*

> *the original suit. According to the practice in this court, it is rather a continuation of the original litigation than the commencement of a new action;* and such, it is believed, is the general understanding of the legal profession in the United States. *Cohens* v. *Virginia,* 6 Wheaton, 410; *Clarke* v. *Mathewson,* 12 Pet. 170."

This decision was cited with approval in *Pennoyer* v. *Neff,* 95 U. S. 735, and was followed in *Michigan Trust Co.* v. *Ferry,* 228 U. S. 353.

In the former of these cases, Mr. Justice Field said:

> "It is hardly necessary to observe, *that in all we have said we have had reference to proceedings in courts of first instance,* and to their jurisdiction, and not to proceedings in an appellate tribunal to review the action of such courts. The latter may be taken upon such notice, personal or constructive, as the State creating the tribunal may provide. *They are considered as rather a continuation of the original litigation than the commencement of a new action. Nations et al.* v. *Johnson et al.,* 24 How. 195."

It is difficult to differentiate the taking of an appeal in a pending action, from a proceeding to revive a non-abatable action after the death of a defendant, who personally appeared therein and had his day in court and actually litigated as to the subject-matter of the action. *In both cases there is a mere continuation of the original litigation and not the commencement of a new action. Chapter 253 of the Laws of 1925 proceeds on that theory.*

In the second case (228 U. S. 353), William M. Ferry died, domiciled in Michigan, in 1867. His will was proved and the defendant, Edward P. Ferry, was appointed executor by the Probate Court of Ottawa County, Michigan, and qualified and entered upon his duties. In 1878 he removed

to Utah, and, becoming incompetent, was there, in 1892, put under the guardianship of two sons. In 1903 residuary legatees and devisees petitioned the Michigan Probate Court that the defendant be removed from his office of executor, that he be ordered to account for the unadministered residue of the estate and that the Michigan Trust Company be appointed administrator *de bonis non* with the will annexed. Notice of the petition and of the time and place of the hearing was given by publication and also was given to the defendant and his guardians personally in Utah. Judgment was rendered against the defendant and its validity became the subject of consideration before this Court, where Mr. Justice Holmes said that *"if a judicial proceeding is begun with jurisdiction over the person of the party concerned, it is within the power of the State to bind him by every subsequent order in the cause."*

Although these decisions and those cited under subdivisions (2) and (3) of this Point were called to the attention of the New York Court of Appeals (240 N. Y. 379), as shown by the abstract of argument on pages 381-382, they were in no manner noticed in the opinion. The Court treated the case not as a proceeding for the revival of a suit which had actually been brought against Gould in his lifetime and litigated by him in the courts of New York until his death, but as an entirely new and original action brought against the non-resident executors. The parallel suggested between this case and *Riverside and Dan River Cotton Mills* v. *Menefee* (237 U. S. 189) does not exist.

The suggestion of Judge Pound at pages 387-388, that even if this Act might be valid as to executors but not as to administrators, the statute cannot be sustained as to either because it goes too far to enable the separation of the good from the bad, ignores the terms of the statute. It refers not only to administrators, but also to executors. By its terms it differentiates between the two. It speaks

disjunctively of executors *or* administrators. The difference between them is considered under subdivision (5), *infra*. It is a matter of the utmost simplicity to distinguish between them. It is not made a condition of the validity of the statute that it shall be applicable alike to executors and administrators.

Berea College v. *Kentucky*, 211 U. S. 45, 54-56.
Carey v. *South Dakota*, 250 U. S. 118, 121.
Weller v. *New York*, 268 U. S. 319.

Kindred in character with the case now before the Court are the following decisions:

Peaslee v. *Peaslee*, 147 Mass. 179 (opinion by Mr. Justice Holmes).
White v. *White*, 65 N. J. Eq. 747 (opinion by Mr. Justice Pitney, late a member of this Court).
Elsasser v. *Haines*, 52 N. J. Law 19.
Fitzsimmons v. *Johnson*, 90 Tenn. 428 (in which decision Mr. Justice Lurton, late a member of this Court, participated).

In all of these cases *Nations* v. *Johnson* was followed.

See also:

Logan v. *Greenwich Insurance Co.*, 144 App. Div. 372; aff'd 203 N. Y. 611.

The proceeding for the revival of this action possesses all of the elements of the cases just referred to. The New York Supreme Court having obtained jurisdiction over George J. Gould, it was within the competency of the Legislature on his death to enable that Court to bring before it his executors, even though they could not have been made parties defendant had this been an original suit.

Hence, for all purposes of due process of law, the New York Supreme Court acquired the power to continue this action, which had long been awaiting decision and which was strenuously litigated in the tribunals of that State by the testator of Kingdon Gould and Schuyler Neilson Rice, who, under his last will and testament, have been made the custodians of his property and have been directed by him as to its disposition and management. What is now sought to be accomplished in no essential respects differs from that which was regarded as a legitimate exercise of legal process as against non-residents in *Nations* v. *Johnson* and *Michigan Trust Co.* v. *Ferry,* where the proceedings instituted were in the nature of a continuation of actions brought and litigated in jurisdictions other than those wherein the persons proceeded against resided and upon whom process could not be served in the State where the actions were pending.

When the Court in this case acquired jurisdiction over George J. Gould for the purposes of this action, such jurisdiction was not limited but was sufficiently broad to enable the Court, exercising the powers conferred upon it by the Legislature, to do whatever was necessary in the course of the litigation to render an effective judgment. The death of George J. Gould did not create a bar against the exercise of such power; nor did the unwillingness of his executors to consent to a continuance of the litigation so operate.

It is believed that, regardless of all other reasons, this element distinguishes the present case from those relied upon by the executors.

(4) *The provision added to Section 160 of the Decedents' Estate Law by Chapter 253 of the Laws of 1925, in unmistakable terms deals with the precise situation existing in this case. The constitutionality thereof prop-*

erly came up for determination in the proceedings now sought to be reviewed and was determined adversely to the petitioners in the highest Courts of New York having jurisdiction in the premises.

Campbell v. *Holt*, 115 U. S. 620.
Robinson v. *Robins Dry Dock & Repair Co.*, 238 N. Y. 271.
Danforth v. *Croton Water Co.*, 178 Mass. 472.
Dunbar v. *Boston & Providence R. R. Corp.*, 181 Mass. 383.

When this case was before the Court of Appeals in the prior proceeding (*McMaster* v. *Gould*, 240 N. Y. 379), the only question presented was whether, under Section 160 of the Decedents' Estate Law, as it stood at the time when the Appellate Division made its certificate pursuant to the New York procedure, the action could be revived against Gould's executors. The question certified was:

> "Did the Court at Special Term have power to substitute the executors of the last Will and Testament of George J. Gould, deceased, appointed by the Orphans' Court of New Jersey, where his will was probated, as parties defendant herein without their consent, in place of their testator, pursuant to the proceedings instituted by the plaintiffs herein for that purpose, and to revive as against the executors this action, which at the time of testator's death was pending in the Supreme Court of this State?"

The Court of Appeals held that it could review the question certified, *and no other, and that the effect of the newly enacted statute* (Chap. 253 of the Laws of 1925), *passed subsequent to the decision by the Appellate Division, had not been discussed or considered by that Court. A new question was, therefore, presented for the first time in the Court of Appeals, and that Court could not, therefore,*

consistently answer the question in the affirmative even though the constitutionality of the statute were upheld. "If the court below was right when it certified the question, it is still right," said Judge Pound, speaking for the Court (*McMaster* v. *Gould,* 240 N. Y. 384, 385).

While it is true that the Court, after having thus disposed of the case on the ground stated, indicated that in its opinion the act was unconstitutional. That did not preclude the institution of a new proceeding under the statute for the purpose of preparing the way for an adjudication by this tribunal, as to the validity of the statute, in the only way possible.

The decision by the Court of Appeals last referred to could not have been reviewed here because primarily based on the procedural ground just mentioned, which would have precluded a consideration by this Court of the constitutional question.

The opinion of the Court of Appeals in 240 N. Y. 379, received adverse comment from the editors of the Yale Law Journal (January, 1926, p. 371), as follows:

> "In the final analysis 'due process' appears to be no more than 'reasonableness.' *Comments* (1925), 34 *Yale Law Journal,* 886. The statute in question seems to fulfill this requirement, for one of the most important functions of the probate courts is to settle all just claims against a decedent. 3 Schouler, *Wills, Executors and Administrators* (6th ed., 1923), Sec. 1391. And although the original conception of jurisdiction, as the authority of the sovereign over territory in which the defendant is found, is still the standard test, there is to-day a growing acknowledgment that fair notice, when in conjunction with the operative facts giving rise to a cause of action, is the better test. *Comments* (1925), 34 *Yale Law Journal,* 415. So it would seem that a contrary and more desirable result could have

been reached in the instant case, unless the court is justified in its assumption that the ancient rule that the decedent's representative has no legal existence in another state because merely the statutory creature of the state of his appointment, can have no exception. But the very fact that the law of wills, executors and administrators was created and is governed by statute, should be sufficient reason to validate any reasonable changes in it which the legislature might care to make. And the ancient rule actually has many exceptions to-day. Thus an action *in rem* to foreclose a lien may be maintained against a foreign executor. *Holmes* v. *Camp* (1916), 219 N. Y. 359, 114 N. E. 841. Where a legatee sued the executor and other legatees to obtain a distribution of the estate, the foreign executor of a deceased non-resident legatee, being a necessary party, was joined as defendant. *Stone* v. *Demarest* (1902, 1st Dept.), 67 App. Div. 549, 73 N. Y. Supp. 903. An administrator appointed in one state may be sued in another for a debt owed by the intestate. *Evans* v. *Tatem* (1823, Pa.), 9 Serg. & R. 252; *contra: Fay* v. *Haven* (1841, Mass.), 3 Metc. 109 [on ground that it was not equitable to permit foreign representative to be sued when he could not himself sue. But New York by statute permits him to sue. 3 Bliss, *N. Y. Annotated Code* (6th ed., 1913), sec. 1836 (a)]. Where jurisdiction was obtained by service of summons within the state on a foreign executor who died thereafter, the action was continued against the foreign administrator with the will annexed, without further service. *Thorburn* v. *Mitchell* (1920, 1st Dept.), 193 App. Div. 174, 183 N. Y. Supp. 424. Moreover, in the instant case, there would seem to be sufficient privity between the decedent and his executor to constitute the entire matter but a single code cause of action. *Latine* v. *Clements* (1847), 3 Ga. 426; see Clarke, *The Code Cause of Action* (1924), 33 *Yale Law Journal*, 817. Under the instant decision, due to the courts' clinging to the narrow, territorial

> notion of jurisdiction which seems out of harmony with the ever increasing interstate activity of today, the plaintiff is forced to the delay and expense of reinstituting his action in another state."

(5) *Regardless of what might be the rule in the case of the revival of an action under these circumstances against administrators appointed in a foreign jurisdiction, there is a distinct differentiation in the case of executors of a will probated in a foreign jurisdiction.*

In *McMaster* v. *Gould* (240 N. Y. 379), Judge Pound recognized this distinction, as did Judge Cardozo in *Helme* v. *Buckelew,* 229 N. Y. 363. In the latter case Judge Cardozo said (p. 366), quoting from *Hill* v. *Tucker,* 13 How. 458, 466:

> "The executor's interest in the testator's estate is what the testator gives him. That of an administrator is only that which the law of his appointment enjoins."

Further on he says (pp. 366-367):

> "Executors, however, were held to occupy a position which had some elements of difference. Like administrators, they were not subject to suit in another jurisdiction until letters were granted to them. Apparently the reason for this was that the courts of another jurisdiction were not *bound* to recognize their authority. If, however, their authority *was* recognized, as where they took out ancillary letters, a judgment obtained in one jurisdiction was not void of all effect when put in evidence in another. * * * Executors, unlike administrators, stood in privity with each other." (Italics those of the Court.)

Continuing, Judge Cardozo said (p. 367):

> "These were the general rules as they stood before the statute.* They were not, however, without exceptions. According to some decisions, an executor or administrator might submit to the jurisdiction of the foreign courts, and the judgment would then bind him everywhere (*Lawrence* v. *Nelson*, 143 U. S. 215, 222; *Chicago Life Ins. Co.* v. *Cherry*, 244 U. S. 25, 29; *Newark Savings Inst.* v. *Jones*, 35 N. J. Eq. 406; *Babbitt* v. *Fidelity Trust Co.*, 70 id. 655). But even without waiver of immunity, a court of equity took jurisdiction at times over foreign representatives when it was necessary to intervene for the administration of local assets."

We pause here to point out that what we are seeking to do in the present case is to revive an action properly brought in the Courts of New York against the testator, not to institute an original action against his executors. The statute permits the court called upon to intervene for the necessary purpose of effectuating its existing jurisdiction over the subject-matter of the action and over the person of the testator. We are not dealing with an administrator who is an officer of a foreign sovereignty, but with executors whose interest in the testator's estate was acquired directly from him.

In *McMaster* v. *Gould*, on reargument, Judge Pound said (p. 386):

> "The will is the source of the executor's power and letters testamentary are evidence of his authority, but the rights and liabilities of both executors and administrators in respect to the fund

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* This refers to Section 1836a of the Code of Civil Procedure, which is practically the same as subdivision 1 of Section 160 of the Decedents' Estate Law as it stood prior to the enactment of Chapter 253 of the Laws of 1925.

> in their hands are like those of trustees. The wide distinction between the nature of the title of executors and administrators had disappeared but this essential difference as to the source of title remains; the foreign administrator exists only by virtue of the statute of another State; the executor's authority springs from the will and not from the letters testamentary."

Here, again, the Court failed to observe that the amendment of 1925 does not relate to the commencement of a new action, but is confined to the revival of an action actually pending in the courts of New York against a defendant of whom those courts had obtained jurisdiction, and which the statute permits them to continue for the rendition of judgment against the foreign executors of the deceased defendant.

It has been well said that an executor named by a testator in his will and the testator are *eadem persona* (*Matter of Martin,* 82 Misc. Rep., N. Y., 589). For the purpose of litigation pending at the time of the death of the testator, the executorship may be said to constitute an extension of the testator's existence. It is, therefore, no more doing violence to justice in a case like the present for the court of New York, under the sanction of its Legislature, to bring into litigation pending before such court the executor of a deceased defendant domiciled in another State, than it was for this Court to sustain similar procedure in the interest of justice in *Nations* v. *Johnson,* 24 How. 195, and in *Michigan Trust Co.* v. *Ferry,* 228 U. S. 353.

In *Hill* v. *Tucker,* 13 How. 458, 466, Mr. Justice Wayne, speaking of the relations or privity between executors and testators, said:

> "Louisiana, in her code, without adopting the terms of the civil law, makes the same distinction

> as is made at common law, between one called upon to administer the estate of an intestate, and one appointed to the office of executor by a testator. The responsibilities of both, as to the manner of settling the estate which they represent, depend upon the law of the State; but the relation between executor and testator is altogether different. The executor's interest in the testator's estate is what the testator gives him. That of an administrator is only that which the law of his appointment enjoins. * * * But though the executor's trust or appointment may be limited, although there are several executors in different jurisdictions, and some of them limited executors, they are, as to the creditors of the testators, executors in privity, bearing to the creditors the same responsibilities as if there was only one executor. The privity arises from their obligations to pay the testator's debts, wherever his effects may be, just as his obligation was to pay them. The executor's interest in the testator's estate is derived from the will, and vests from the latter's death, whatever may be the form which the law requires to be observed before an executor enters upon the discharge of his functions. * * * Between administrators deriving their commissions to act from different politcal jurisdictions, there is no such privity."

In *Fidelity & Casualty Co.* v. *Freeman*, 109 Fed. Rep. 847, the Court, consisting of Circuit Judges Lurton, Day and Severens, said:

> "The executor derived his authority from the will. He was not an officer of the court, but was regarded as a trustee for the purposes declared by the testator, and could, before probate, do nearly all things required for the settlement of the estate except that he could not bring suits in the courts. The probate was for the purpose of definitely determining his character, and establishing it once for all, and enabling him to make profert of his authority in the

> manner required by the practice of the courts. Ordinary administration was in derogation of his rights as executor, which could not be thus taken away. And it was at one time held that such an administration was void upon the subsequent production and probate of the will."

In *Hartnett* v. *Wandell*, 60 N. Y. 346, 350, Judge Allen said:

> "It is true that by the statutes of this State, executors are not permitted to exercise their powers except to a very limited extent, until proof of the will and the granting of letters testamentary. But this does not affect the character of the office or detract from the efficacy of the will as the source of the power. An executor derives power from the will, but an administrator owes his to the appointment of the surrogate. (Lovelass on Wills, 382, et seq.) An executor can derive his office from a testamentary appointment only."

In *Matter of Bergdorf*, 206 N. Y. 312, Judge Collin said:

> "The title and general powers of an executor have their source in the will under which the executorship exists. Within the regulations and restrictions prescribed by law, a testator may commit the custody and administration of his estate to such executor or executors as he pleases, and his selection and designation alone it is which invests them with authority and power. The letters testamentary, founded upon the probate of the will, neither create the executor nor confer title or power upon him. They are the authentic evidence that the will has been duly proven; that the testator competently and in fact made the selection and designation of the executor, and that permission has been given the executor, by the court having jurisdiction, to exercise the powers conferred by the testator through the will."

(6) *Independently of this statute and of permissive legislation, it has been decided that actions may be maintained in the courts of New York against foreign executors where it is necessary to prevent a failure of justice. That fact emphasizes the contention that Chapter 253 of the Laws of 1925 does not violate the due process clause.*

McNamara v. *Dwyer,* 7 Paige 239, 241.
Colbert v. *Daniel,* 32 Ala. 314.
Bergmann v. *Lord,* 194 N. Y. 70.
Montgomery v. *Boyd,* 78 App. Div. 64.
Holmes v. *Camp,* 219 N. Y. 359.
Gould v. *Gould,* 122 Misc. Rep. 152.

If there ever was a case where there would be a failure of justice if jurisdiction were not exercised by courts over a foreign executor, it is now presented. Here, the litigation had been proceeding in the courts of New York for nearly fourteen years. George J. Gould had appeared and had personally taken an active part in it. He testified at great length in his own behalf. He was represented by able counsel. Although he may have been a citizen of New Jersey, he also maintained a residence in New York, where he had his office and transacted business national in its scope (*Rec., fols.* 72-77). At the time of his death the case was practically ripe for judgment, but, because of the promotion to the Appellate Division of Mr. Justice Finch, before whom the case was in course of trial, he became disqualified from pronouncing judgment and a mistrial resulted (*Rec., fol.* 65).

It was claimed on behalf of George J. Gould that at the time that the action was commenced, the cause of action against him had been barred under the laws of New Jersey. It is now suggested on the part of the executors that the petitioners are to be relegated to the

courts of that State for the enforcement of any cause of action that they may have had against the testator It would follow, even if this contention as to the operation of the Statute of Limitations of New Jersey at the time of the commencement of this action was unsound, that beyond all question the petitioners would now be debarred of remedy in the courts of New Jersey because of the lapse of time since the commencement of the action in the courts of New York (*Rec., fols.* 94xx-97yy). It is not believed that where an action pending in a court of equity is of such a nature as to survive the death of the person against whom it lies, it may nevertheless be destroyed by his death prior to the rendition of judgment, if the right of action has become barred by the Statute of Limitations of the State where the decedent's will was probated and his executors qualified. Such a result would be a reproach to any system of laws, because it would bring about an utter failure of justice, solely in consequence of the application of a highly technical and artificial rule of procedure.

The defendant Herrick is a resident of the State of Ohio. He pleaded the Ohio Statute of Limitations (*Rec., fols.* 94zz-96zz). If the executors' contentions were correct, upon the death of Herrick the action as to him would likewise abate in New York and his executors could only be proceeded against in Ohio. We would, therefore, have the astounding result that, after the death of the defendants, an action properly commenced in New York and over which the New York courts had lawfully obtained jurisdiction, would have to be split into two actions and begun anew in two foreign jurisdictions, in both of which actions the defendants would assert the bar of the Statutes of Limitations of those jurisdictions, because of the lapse of time running during the pendency of the action properly brought in New York. It would, in effect, amount to a state of anarchy if, in spite of legislative authority,

the courts were impotent to assert the power under conditions here presented to proceed to judgment against the executors of deceased defendants.

Doubtless the Legislature, recognizing that New York was one of the great commercial centres of the world, to which men of affairs residing in every part of the United States resort, where they enter into important contracts and incur obligations of vast amounts, and where they frequently are involved in litigaton over which the courts of New York acquire and exercise jurisdiction by due process of law, enacted this statute for the purpose of dealing with just such a situation as exists in the present case and is likely to be of frequent recurrence.

Thousands of men are engaged in active business in New York City and have their homes in New Jersey and Connecticut. If they are plaintiffs in actions pending in the courts of New York, at the time of their death, their personal representatives may be substituted as plaintiffs. It has thus far been held in this case that if they are defendants, and their wills are probated in New Jersey or Connecticut, their personal representatives may defy the courts of New York.

The provisions of the Act which has been declared unconstitutional are just and reasonable. They fully safeguard the interests of the estate of the deceased and of his personal representatives. They merely permit to be continued an action over which the courts of the State had acquired full jurisdiction both as to subject-matter and person. To declare such legislation to be a deprivation of due process of law is to disregard modern conditions. The executors are not deprived of their day in court. It is accorded to them. They are merely brought before a judicial tribunal for the purpose of enabling it to continue a proceeding which was in course of being adjudicated in perfect conformity with due process of

law. To declare such a statute unconstitutional as wanting in due process, is to distort that time-honored phrase from its true significance. It would pervert the most fundamental principles of justice into weapons of injustice.

(7) *Chapter 660 of the Laws of 1926, which undertook to repeal Section 160 of the Decedents' Estate Law, does not affect the proceedings at that time pending under subdivision 2 of Chapter 253 of the Laws of 1925.*

The so-called repealing Act was passed on April 29, 1926, a few days before the last argument in the Court of Appeals. It contained no provision which in any way affected pending proceedings. It reads as follows:

> "Section one hundred and sixty of chapter eighteen of the laws of nineteen hundred and nine, entitled 'An act relating to the estates of deceased persons, constituting chapter thirteen of the consolidated laws,' as added by chapter nine hundred and nineteen of the laws of nineteen hundred and twenty, and last amended by chapter six hundred and three of the laws of nineteen hundred and twenty-five, is hereby repealed."

It made no specific reference to Chapter 253 of the Laws of 1925, with which we are now concerned. It in no way expressed the purpose of being applicable to proceedings then pending under Section 160 of the Decedents' Estate Law. That statute was one of the Consolidated Laws of the State of New York, consisting of many chapters, wherein the general statutes of the State were arranged in classfied order. One of these statutes was the General Construction Law, which is Chapter 22 of the Consolidated Laws. It applied to all future legislation and laid down rules of construction applicable to all of the general legislation of the State. Two of its provisions, constantly

invoked and applied, demonstrate that the repealing Act of 1926 has no bearing upon proceedings pending at the time of its enactment. These provisions are Sections 93 and 94 of the General Construction Law. They read:

> "SEC. 93. *Effect of repealing statute upon existing rights.* The repeal of a statute or part thereof shall not affect or impair any act done, offense committed or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred, prior to the time such repeal takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted as fully and as to the same extent as if such repeal had not been effected.
>
> SEC. 94. *Effect of repealing statute upon pending actions and proceedings.* Unless otherwise specially provided by law, all actions and proceedings, civil or criminal, commenced under or by virtue of any provision of the statute so repealed and pending immediately prior to the taking effect of such repeal, may be prosecuted and defended to final effect in the same manner as they might if such provisions were not so repealed."

Among the many cases in which these rules have been applied by the New York Court of Appeals are:

Cameron v. *N. Y. & M. O. W. Co.*, 133 N. Y. 336.
Close v. *Noye*, 147 N. Y. 597.
People v. *N. Y. C. & H. R. R. R. Co.*, 156 N. Y. 570.
Geneva R. R. Co. v. *N. Y. C. & H. R. R. R. Co.*, 163 N. Y. 228.
Champlain v. *McCrea*, 165 N. Y. 264, 275.

(8) *The petitioners had exhausted all of the remedies by appeal open to them in the courts of New York under the Civil Practice Act for the purpose of sustaining the constitutionality of Chapter 253 of the Laws of 1925,*

declared to be violative of the Fourteenth Amendment. Unless, therefore, they secure a hearing in this Court, they will be unable to revive their action against Gould's executors, the decisions heretofore rendered constituting a finality so far as the State courts are concerned.

The jurisdiction of the Court of Appeals of New York is regulated by Sections 588 to 591 of the Civil Practice Act. The petitioners resorted to every proceeding which could be taken under those sections. The Special Term denied the relief for which the petitioners asked, on the sole ground that Chapter 253 of the Laws of 1925 violated the Fourteenth Amendment. It is so stated in its order. The Appellate Division affirmed without opinion. An application was then made to that Court, under subdivision 4 of Section 588 of the Civil Practice Act, for leave to appeal to the Court of Appeals and for the certification of the constitutional question. That motion was denied.

It is to be noted that under subdivision 4 it is only the Appellate Division that can grant leave in such a case. Subdivision 5 only relates to a case where a judgment or order has been entered upon the decision of an Appellate Division of the Supreme Court which finally determines an action or special proceeding but which is not appealable under subdivision 1 of the section. Subdivision 1 refers to a case where an appeal may be taken as of right from a judgment or order which finally determines an action or special proceeding wherein is directly involved the construction of the Constitution of the State or of the United States.

After the denial of the application made to the Appellate Division for leave to appeal to the Court of Appeals, the petitioners, out of abundance of caution, appealed to that Court from the order of affirmance rendered by the Appellate Division. The Court of Appeals, however, dis-

missed the appeal without opinion. It could not well have done otherwise under the terms of the Civil Practice Act.

Here, the petitioners pursued the procedure indicated by this Court as proper in *Southern Electric Co.* v. *Stoddard*, 269 U. S. 186, and took the steps which the plaintiff-in-error in that case failed to take. Mr. Chief Justice Taft said (p. 189):

> "By the first paragraph of Section 588 of the Civil Practice Act of New York an appeal to the Court of Appeals may be taken as of right from the judgment or orders entered upon a decision of the Appellate Division which finally determines an action or special proceeding where is directly involved the construction of the Constitution of the State or of the United States. In this case there is directly involved the construction of the Constitution of the United States, and therefore it would seem that an appeal could have been taken from the Appellate Division as of right to the Court of Appeals, *but this was not done.* Instead, application was made to the Appellate Division to certify that a question of law was involved in the case which ought to be reviewed by the Court of Appeals, and that certificate the Appellate Division declined. Thereafter no application was made to the Court of Appeals to allow an appeal."

Here, the petitioners appealed to the Court of Appeals from the order of the Appellate Division after the latter had refused to certify that a question of law was involved in the case which ought to be reviewed by the Court of Appeals.

Paragraph 5 of Section 588, which in the opinion of this Court was referred to as paragraph 4, by its terms was not applicable to a case in which the question involved was a constitutional question, and, therefore, the Court of Appeals could not have been asked to allow an appeal in

such a case, the proper procedure being that pointed out by this Court, namely, a direct appeal from the Appellate Division under subdivision 1 of the section.

This thought is emphasized in the opinion of Mr. Chief Justice Taft in *Southern Electric Co.* v. *Stoddard* (*supra*), where, after discussing the decision in *People* v. *American Trust Co.*, 150 N. Y. 117, it is said (p. 190):

> "This clearly shows that in the view of the Court of Appeals of New York if the order of disallowance in this case involved a Federal constitutional question, as it did on this record, it was directly appealable to that court from the Appellate Division under the first paragraph of Section 588. *The claimant has failed to make proper application to a State court of final resort, and for that reason the writ must be dismissed.*"

We again repeat that, in the case now before this Court, the petitioners made a proper application to the State court of final resort by appealing directly to it from the decision of the Appellate Division after the latter had denied leave to appeal to the Court of Appeals.

Whether or not the order in this case might be regarded as a final determination of an action or special proceeding, within the meaning of that term as used in the New York Civil Practice Act, it is clear under the decisions of this Court and of the Circuit Courts of Appeal following the adjudications of this Court, that there was a determination in the highest court of New York in which a decision could be had, which was "a final judgment or decree" within the meaning of Section 237 of the Judicial Code as amended by Act of February 13, 1925, and particularly subdivision (b) thereof, under which review on certiorari is now sought. Among these decisions are:

Holmes v. *Jennison*, 14 Pet. 540.
Hovey v. *McDonald*, 109 U. S. 150, 155.
Gumbel v. *Pitkin*, 113 U. S. 545, 548.
The Farmers' Loan & Trust Co., Petitioner, 129 U. S. 206, 213.
Credits Commutation Co. v. *United States*, 177 U. S. 311.
Central Trust Co. v. *Chicago, R. I. & P. Ry. Co.*, 218 Fed. Rep. 336, 339.
Stokes v. *Williams*, 226 Fed. Rep. 148.
Central Trust Co. v. *United States Light & Heating Co.*, 233 Fed. Rep. 420.

See especially:

Mt. Vernon Woodbury Cotton Duck Co. v. *Alabama Interstate Power Co.*, 240 U. S. 30, 31.
Detroit & Mackinac Ry. Co. v. *Michigan Railroad Commission*, 240 U. S. 564, 570.

In effect, the proceedings were in the nature of a bill of revivor and the decision denying the relief prayed for was final. The case, therefore, comes directly within the two decisions last cited.

The decision in the State courts was based solely on the ground that Chapter 253 of the Laws of 1925 contravened the Fourteenth Amendment. Even if there had been also non-federal ground on which to base a decision, which we deny, it was not considered by the State court. Hence, this Court has jurisdiction to review the decision rendered.

Henderson Bridge Co. v. *Henderson City*, 173 U. S. 592, 608.
Rogers v. *Hennepin County*, 240 U. S. 184, 188, 189.
Grayson v. *Harris*, 267 U. S. 352, 358.

II.

It is respectfully submitted that the determination of the Supreme Court of New York which has been brought here by writ of certiorari be reversed and that it be directed to grant to the petitioners the relief prayed for.

LOUIS MARSHALL,
JAMES MARSHALL,
Petitioners' Counsel.

and

Supreme Court of the United States

October Term, 1897.

No. [illegible]

HENRY W. McMASTER and FRANCIS H. SKELDING, as Receivers of the Wabash Pittsburgh Terminal Railway Company,

Petitioners,

against

GEORGE J. GOULD; KINGDON GOULD and SCHUYLER NEILSON FISH, as Executors of the Estate of George J. Gould, deceased,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

PETITIONERS' BRIEF ON JURISDICTION.

LOUIS MARSHALL,
JAMES MARSHALL,
Petitioners' Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1927.

No. 85.

HENRY W. McMASTER and FRANCIS H. SKELDING, as Receivers of the Wabash Pittsburgh Terminal Railway Company,

Petitioners,

against

GEORGE J. GOULD; KINGDON GOULD and SCHUYLER NEILSON RICE, as Executors of the Estate of George J. Gould, deceased,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of New York.

PETITIONERS' BRIEF ON JURISDICTION.

On January 9, 1928, an order was made by the Court directing the petitioners and the respondents to show cause "why the writ of certiorari heretofore granted in this case should not be dismissed for want of jurisdiction, on the ground that the decree sought to be reviewed in this Court is not a final decree within the meaning of Section 237 (b) of the Judicial Code, in that it appears that Myron T. Herrick, one of the defendants, has appeared and answered the bill of complaint, and that the

cause is still pending as to the said Myron T. Herrick in the Supreme Court of the State of New York, and therefore has not been finally and completely determined."

An action was brought in the Supreme Court of New York by the petitioners, as plaintiffs, against George J. Gould, Myron T. Herrick and others, as Managers and Trustees of the Pittsburgh and Toledo Syndicate, for an accounting of funds received by them for the use of the Wabash Pittsburgh Terminal Company. The complaint alleged that the defendants *and each of them* refused and neglected to pay over to the Terminal Company the moneys received by them as managers of the syndicate and as agents and trustees for the Terminal Company (*Rec.*, p. 29). The prayer for judgment was, that the defendants account to the plaintiffs for all transactions had by the defendants, *or any of them*, or by the syndicate or its managers, as agents or trustees of the Terminal Company, and especially for the disposition of any moneys received or held by them, *or any of them*, as agents or trustees of the Terminal Company, or for the account of the Terminal Company, and that upon the completion of such accounting the defendants *and each of them* be decreed to pay over to the plaintiffs such sums as shall be ascertained to be due *from them or any of them* to the plaintiffs (*Rec.*, pp. 29-30).

The defendants George J. Gould and Myron T. Herrick served separate answers.

Upon the death of the defendant Gould, the proceedings now before this Court were instituted by the petitioners for the revival of the action mentioned and for the substitution of his executors as parties defendant therein in his place and stead (*Rec.*, p. 6). The application was denied by the Special Term of the New York Supreme Court "upon the sole ground that Chapter 253 of the Laws of 1925, on the authority of which this proceed-

ing was brought, is unconstitutional and null and void, in that the constitutional requirement of the Fourteenth Amendment to the Constitution of the United States of due process of law precludes the Legislature from providing generally for continuing actions for judgments *in personam* against foreign executors or administrators of deceased defendants" (*Rec.*, p. 5).

The executors of George J. Gould made a cross-motion for an order vacating and setting aside the service of the order to show cause obtained by the petitioners in the court below, and that motion was likewise granted by the Special Term upon the sole ground that Chapter 253 of the Laws of 1925, upon the authority of which this proceeding was brought, was unconstitutional (*Rec.*, pp. 5-6, 59). On appeal to the Appellate Division of the First Department, the order of the Special Term denying the relief prayed for in these proceedings by the petitioners and granting that prayed for by the respondents was affirmed. That Court denied leave to appeal to the Court of Appeals and an appeal taken to that Court out of abundance of caution was dismissed. Thereupon, on petition to this Court, a writ of certiorari was granted.

On the merits, the sole question presented by the record relates to the constitutionality of the New York statute. It provides that "an action or proceeding pending in any court of" the State of New York "in which the court shall have obtained jurisdiction of the person of a defendant or respondent who is domiciled in any other state * * * shall, if the cause of action survives, not abate by reason of the death of such defendant or respondent, but his executor or administrator duly appointed in such state * * * shall, upon the application of the adverse party, and upon such notice as the court may prescribe, be brought in and substituted in the place of the decedent and the action or proceeding shall continue."

POINTS.

I.

It has been shown under Point I of our main brief that the action brought against George J. Gould survived upon his death and is enforceable against his personal representatives (Petitioners' Brief, p. 8).

II.

The proceedings for the revival of the action and the substitution of the executors of George J. Gould, instituted under Chapter 253 of the Laws of 1925, were the equivalent of a bill of revivor and constituted independent proceedings ancillary to the original bill of complaint. The decisions rendered by the courts of New York denying petitioners' application were final as to those proceedings and are reviewable here as a final decree within the meaning of Section 237(b) of the Judicial Code.

The procedure under the New York statute is the precise equivalent of a bill of revivor in simplified form. Instead of filing a formal bill, the proceedings are instituted by an order to show cause. The only parties to these proceedings were the petitioners and the respondents as executors of George J. Gould, deceased. Myron T. Herrick, who is a defendant in the accounting action, was not a party to the proceedings. They did not affect him in any way, their sole object being to revive the action against the executors of George J. Gould and to substitute them as defendants in his place and stead. No question was raised as to the necessity of making the defendant Herrick a party to the proceedings. Nor was he a

party to the appeals taken to the New York appellate tribunals. Nor was he a party to the application presented to this Court for a writ of certiorari. Nor was he a necessary or even a proper party to the proceedings.

In 2 *Street on Federal Equity Practice*, Sec. 1212, p. 734, the author says:

> "A bill of revivor, properly so-called, lies only by or against the persons who are the proper representatives of the deceased party as to the matters in controversy."

The same language is used in *Gibson's Suits in Chancery*, Sec. 701, and in 1 *Daniel's Chancery Practice*, 2nd Am. Ed., 1704.

In *Farmers' Loan and Trust Co.* v. *Seymour*, 9 Paige's Ch. Rep. 538, Chancellor Walworth said (p. 542):

> "Where the abatement of a suit is caused by the death of one of several defendants, and the suit is revived by the complainant in the original suit, it appears to be only necessary, in a simple bill of revivor, to bring the representatives of the decedent before the court, *without making the surviving defendants parties to such bill.* (3 Dan. Ch. Pr. 311; Lube's Eq. Pl. 144; 11 Ves. Rep. 308; 1 Eq. Ca. Abr. 4, pl. 3.) * * * The same rule which applies to a simple bill of revivor against the representatives of one of several defendants, appears to hold in the case of a supplemental bill in the nature of a bill of revivor, to bring the devisee or assignee of the original defendants before the court. In *Jones* v. *Jones* (3 Atk. Rep. 317), where the objection was made that the complainant in such a bill had not made the defendants in the original bill parties, Lord Hardwicke held that it was not necessary to make them parties, and that those defendants could not, upon the hearing, object for want of parties. And in the very recent case of *Clough*

v. *Bond*, decided by the vice-chancellor of England on the 15th of December last [1841] (6 Lond. Jur. Rep. 49), where a supplemental bill was filed to bring the representative of a deceased party before the court, it was objected that the other defendants were not made parties to such supplemental bill, his honor said, 'If a supplemental bill be only for the purpose of bringing a party before the court upon a given case, it is sufficient to make that individual alone a party, without making the other defendants parties thereto; but if the supplemental bill be filed to bring new facts before the court, then the old defendants to the record must also be made parties to the supplemental bill.' * * *

In the case now under consideration, this supplemental bill in the nature of a bill of revivor is filed for the sole purpose of reviving and continuing the proceedings in the original suit which had become abated by the death of the defendant Garrow, against his assignee who had become such pendente lite, and for the purpose of having a decree of foreclosure and sale of the mortgaged premises upon the case made upon the original bill merely, and not upon any new facts brought before the court by this supplemental bill in the nature of a bill of revivor. I am not able therefore to distinguish it from the case of *Jones* v. *Jones*, decided by Lord Hardwicke in 1745, to which I have before referred. * * * But considering the great expense and delay it might cause to suitors in this court, to require that, upon every change of the interest of a defendant, by death, bankruptcy, or otherwise, by which the suit becomes abated or defective as to him, all the other defendants should be made parties to the bill to revive or continue the proceedings against the person who had succeeded to his rights, I do not feel authorized to change the rule of pleading which I find to exist on this subject."

It necessarily follows that these proceedings, although they relate to the action for an accounting to which George J. Gould and Myron T. Herrick were parties defendant,

were merely ancillary to that suit and resulted in a determination which, unless reversed, was a finality, namely, that the action to which they related could not be revived and the executors of George J. Gould could not be substituted as defendants in his place.

This determination, to use the language of Mr. Justice Bradley in *Williams* v. *Morgan*, 111 U. S. 699, "was final in its nature and was made in a matter distinct from the general subject of the litigation, a matter by itself which affected only the parties to the particular controversy and those whom they represented."

There is no appreciable difference, so far as finality is concerned, between the question here presented and those arising in cases of prohibition, mandamus, and the like, which relate to other existing litigation.

Thus, in *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U. S. 30, a petition for a writ of prohibition was sued out to prevent the Probate Court from taking jurisdiction of condemnation proceedings instituted by the Alabama Interstate Power Company to take lands, water and water rights belonging to the petitioner. An alternative writ was issued, but the Supreme Court of the State ordered it to be quashed and the writ dismissed. The grounds of the petition were that the proceedings contravened the Fourteenth Amendment to the Constitution of the United States. The objection was overruled. A writ of error to this Court was then sued out, whereupon a motion to dismiss was made on the ground that the decision of the State court was not final because it did not determine the merits of the controversy to which it related. That motion was denied, Mr. Justice Holmes saying:

> "Prohibition is a distinct suit and the judgment finally disposing of it is a final judgment within the meaning of the Judicial Code, * * * under the

> statutes of Alabama and by the common law. *Weston* v. *Charleston*, 2 Pet. 449, 464, 465. The fact that it does not decide the merits of the principal suit is immaterial. It is not devoted to that point, but only to the preliminary question of the jurisdiction of the court in which that suit is brought."

In *Detroit & Mackinac Railway Co.* v. *Michigan Railroad Commission*, 240 U. S. 564, the case was one of mandamus to enforce an order of the Railroad Commission. The constitutionality of the statute was presented by the mandamus proceedings. The jurisdiction of this Court was called in question upon the ground that the judgment determining the proceedings in mandamus was not final in the sense of Section 237 of the Judicial Code "because the judgment did not determine the merits and end the litigation." This objection was overruled, Mr. Justice VanDevanter saying:

> "But, as this Court has said, 'all judgments and decrees which determine the particular cause' are final in the sense of the statute. *Weston* v. *Charleston*, 2 Pet. 449, 463-465; *Central Transportation Co.* v. *Pullman Co.*, 139 U. S. 24, 40; *Mt. Vernon Cotton Co.* v. *Alabama Power Co.*, 240 U. S. 30. This view has prevailed through a century of practice in reviewing judgments and decrees dismissing causes for want of jurisdiction or for other reasons not decisive of the merits. And it is settled that a proceeding in mandamus is an independent adversary suit and a judgment awarding or refusing the writ is a final judgment within the meaning of the statute."

Here, the proceeding for revival and substitution of Gould's executors was likewise an independent adversary proceeding. It had no relation to the merits of the litigation to which it related, but it involved a controversy arising under a statute, the constitutionality of which was in

question, which related solely to the petitioners' right to continue the litigation to which it referred against the foreign executors of a deceased defendant.

Similar questions have arisen in applications for intervention where judgments granting or dismissing the intervention have been declared to be final as to that issue regardless of the merits of the cause in which the intervention was sought.

> *Gumbel* v. *Pitkin,* 113 U. S. 545, 548.
> *Credits Commutation Co.* v. *United States,* 177 U. S. 311.
> *Central Trust Co.* v. *Chicago, R. I. & Pac. Ry. Co.,* 218 Fed. Rep. 336, 339.
> *Central Trust Co.* v. *Grant Locomotive Works,* 135 U. S. 207.

In the case last cited, a suit for the foreclosure of a railroad mortgage, the claim by an intervening creditor of an interest in a locomotive in the possession of the receiver and in use on the road was passed upon by the court. The decree allowing the claim was held to be a final decree upon a matter distinct from the general subject of the litigation, the foreclosure of the mortgages.

Mr. Chief Justice Fuller, in the course of his opinion in that case, said:

> "In *Trustees* v. *Greenough,* 105 U. S. 527, an appeal from an order for the allowance of costs and expenses to a complainant, suing on behalf of a trust fund, was sustained. In *Hinckley* v. *Gilman, Clinton & Springfield R. R. Co.,* 94 U. S. 467, a receiver was allowed to appeal from a decree against him to pay a sum of money in the cause in which he was appointed. In *Williams* v. *Morgan,* 111 U. S. 684, a decree in a foreclosure suit, fixing the compensation to be paid to the trustees under

> a mortgage from the fund realized from the sale, was held to be a final decree as to that matter; and in *Fosdick* v. *Schall*, 99 U. S. 235, a decree upon an intervening petition in respect to certain cars used by a railroad company under a contract with the manufacturer was so treated. There was a fund in court in that case, but in principle the orders here are the same. And see *Farmers' Loan & Trust Co., Petitioner*, 129 U. S. 206, 213."

In *Trustees* v. *Greenough, supra*, Mr. Justice Bradley, answering the objection that the order did not amount to a final decree upon which an appeal would lie to this Court, said:

> "They are certainly a final determination of the particular matter arising upon the complainant's petition for allowances, and direct the payment of money out of the fund in the hands of the receiver. *Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision.*"

In *Clarke, Administrator of Seymour* v. *Matthewson*, 12 Pet. 163, Seymour, a citizen of Connecticut, filed a bill in the Circuit Court of Rhode Island for an accounting between him and the defendants, citizens of Rhode Island. The case was referred to a master to take and state the account between the parties, and before the report was made Seymour died. Administration of his estate was granted to Clarke, a citizen of Rhode Island, who thereupon filed a bill in the Circuit Court to revive the suit and prayed that it should stand in the same situation as at the death of the original complainant. Mr. Justice Story dismissed the bill of revivor for want of jurisdiction, on the ground that Clarke was a citizen of Rhode Island as were also the defendants. The complainant appealed to this Court from the decree dismissing the bill of revivor,

the original suit still remaining in the Circuit Court. This Court reversed the decree in an opinion by Mr. Justice Story, which gives remarkable evidence of his open-mindedness. If the Court had not been satisfied that the decree appealed from was final, it certainly would not have assumed jurisdiction.

The determination of the courts of New York dismissing the motion to revive the action brought by the petitioners against George J. Gould and to substitute his executors, bears the same relation to the original action as did the bill of revivor to the original suit in *Clarke* v. *Matthewson*. In both instances the proceedings to revive, though relating to the original suits as their subject-matter, culminated in an independent judgment, order or decree which constituted a finality as to the matters litigated in the proceedings to revive.

In *Perlman* v. *United States*, 247 U. S. 7, an order was made in an action brought by the Perlman Rim Corporation against Firestone Tire & Rubber Company for the infringement of a patent, where, as a condition to the granting of leave to the plaintiff to discontinue the action and for its dismissal without prejudice, an order was made directing that the evidence taken in that suit be perpetuated and the exhibits impounded in the custody of the clerk, to be kept under seal subject to the order of the Court. Subsequently Perlman presented a petition to the District Court to restrain the United States Attorney from taking the exhibits so impounded into his possession. The petition was denied, and thereupon an appeal was taken to this Court by the petitioner. A motion was then made to dismiss the appeal on the ground that the order of the District Court, if considered as a part of the criminal proceeding about to be instituted against Perlman, was not final but merely interlocutory, and therefore not review-

able by this Court. This contention was overruled, Mr. Justice McKenna saying:

> "We think, therefore, that he (Perlman) could intervene to oppose and urge in opposition property and constitutional rights and their sanctions. His petition was in effect independent and did not lose its character by being entitled in the equity suit."

Here it is further to be observed that Gould's executors who it was sought to substitute as defendants were not parties to the original action. Had the application to make them parties been granted, they doubtless could have appealed and contested the constitutionality of Chapter 253 of the Laws of 1925 by writ of error to this Court. If they could have done so, why not the present petitioners? That was held proper in *Hovey* v. *McDonald*, 109 U. S. 150, 156-157, where a receiver who was not a party to the suit was nevertheless regarded as principal party to what was termed "a side issue" arising in the course of a litigation.

There is a manifest distinction between the question which arises here and that presented by a decree relating to the merits of a case, of which *Hohorst* v. *Hamburg-American Packet Co.*, 148 U. S. 262, is an example. There, a bill was filed in the Circuit Court against a foreign corporation and other defendants who were citizens of the United States, for the infringement of letters patent. It was dismissed as to the foreign corporation, but, so far as appeared from the record on the appeal from the judgment of dismissal, the suit was still pending and undetermined as to the co-defendants.

There, the matter in controversy did not, as here, relate to a collateral or incidental subject. It was a proceeding in the suit. Among the authorities cited in support of the conclusion reached was *Frow* v. *De La Vega*, 15 Wall. 552.

That case merely held that a final decree *on the merits* cannot be made separately against one of several defendants upon a joint charge against all, where the case is still pending as to the others. Mr. Justice Bradley said:

> "If the court in such a case as this can lawfully make a final decree against one defendant separately, *on the merits*, while the cause was proceeding undetermined against the others, then this absurdity might follow: there might be one decree of the court sustaining the charge of joint fraud committed by the defendants; and another decree disaffirming the said charge, and declaring it to be entirely unfounded, and dismissing the complainant's bill. And such an incongruity, it seems, did actually occur in this case. Such a state of things is unseemly and absurd, as well as unauthorized by law."

No such situation exists here. The merits are not dealt with in any sense. Nor is the cause of action in the original suit based on a joint charge against all. The cause of action is joint and several. The wrongful acts are charged against each and all of the defendants, and the judgment prayed for is as against each of the defendants in respect to his acts.

In *Hohorst* v. *Hamburg-American Packet Co., supra,* the cause of action was also a *joint* cause of action and it was alleged that all the defendants had co-operated and participated in all of the acts and infringements complained of.

United States v. *Girault,* 11 How. 22, 32, likewise therein referred to, was a joint suit against four defendants on a bond. Judgment was rendered in the District Court in favor of three of the defendants, but the suit as to the fourth was undisposed of. Under the laws of Mississippi, within whose jurisdiction the action arose, it was ground for reversal of a judgment if final judgment is entered by

the plaintiff before the case is finally disposed of in respect to all the parties on the record. The merits of the action were involved. There was no collateral and independent proceeding, as here. Consequently there was not a final judgment in the sense of the statute conferring appellate jurisdiction upon this Court.

Citation could be multiplied to show that this Court has not placed upon the words "final decree" respecting the right of appeal a strict and technical sense, but that it has given them a liberal and reasonable construction.

Forgay v. *Conrad*, 6 How. 201.
Trustees v. *Greenough*, 105 U. S. 527.
Williams v. *Morgan*, 111 U. S. 699, and other cases above cited.
City of Eau Claire v. *Payson*, 107 Fed. 552.

If in these proceedings the determination of the New York courts were not regarded as final, the most serious consequences inconsistent with justice would ensue. The petitioners would as to Gould and his executors be out of court, notwithstanding the clearly expressed intention of the Legislature of New York that the action as against Gould would not abate and that his executors might be substituted. The sole ground on which this determination is based is the contention that the act is violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States. Nevertheless, the petitioners would be precluded from procuring a review by this Court of that adjudication. So far as the petitioners are concerned they could no longer litigate the liability of Gould or his executors in the State Court. There would be no way for them to bring it before this Court except in the manner in which they have attempted to do so. Had they proceeded with a retrial of the issues in the original action against the defendant Herrick and recovered judg-

ment against him, they could not have appealed from that judgment, and Gould having died and his executors not having been substituted, it is difficult to see how the question, as to which adjudication is now sought, could in any way be effectively brought before this tribunal. The right of revival and substitution could not have been presented on the trial of the original suit. The plaintiffs would have had no standing in court as to Gould or his executors, who would have passed entirely out of the litigation. An attempt to appeal to the Appellate Division or to the Court of Appeals of New York would have been futile in view of the fact that there would be no adversary against whom to appeal.

The petitioners, after having exhausted all of their remedies in the proceedings now presented for review, by the denial of the jurisdiction now invoked, would be deprived of the right to review the important constitutional question upon which their right to litigate as against the respondents in the present proceedings depends. Should it transpire that a judgment against the defendant Herrick were not collectible, then the plaintiffs would suffer irreparable injury. And even if the defendant Herrick were responsible, the elimination of Gould's executors would prove an injustice to him because he would be deprived of the right of enforcing contribution against them.

III.

It is respectfully submitted that this Court has jurisdiction over the decree sought to be reviewed.

LOUIS MARSHALL,
JAMES MARSHALL,
Petitioners' Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1927.

No. 85.

HENRY W. McMASTER and FRANCIS H. SKELDING, as Receivers of the Wabash Pittsburgh Terminal Railway Company,

Petitioners,

against

GEORGE J. GOULD, KINGDON GOULD and SCHUYLER NEILSON RICE, as Executors of the Estate of George J. Gould, deceased,

Respondents.

PETITION FOR REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The above-named Henry W. McMaster and Francis H. Skelding, as Receivers of the Wabash Pittsburgh Terminal Railway Company, pray for a rehearing in this proceeding, and respectfully show:

I. This proceeding was commenced under Chapter 253 of the Laws of 1925 of the State of New York, for an order reviving the action brought by the petitioners against

George J. Gould and others, as Managers and Trustees of the Pittsburgh and Toledo Syndicate, for an accounting, said George J. Gould having died on May 16, 1923, and for the substitution of Kingdon Gould and Schuyler Neilson Rice, as his executors, as defendants in his stead. At the time of the death of George J. Gould he was a resident of the State of New Jersey and his last will and testament was admitted to probate there and letters testamentary were issued to Kingdon Gould and Schuyler Neilson Rice.

II. The application to revive the action and to substitute the executors of George J. Gould as defendants was made at a Special Term of the Supreme Court of the State of New York held in and for the County of New York, and was denied by an order entered in the office of the Clerk of New York County on November 16, 1925, "upon the sole ground that Chapter 253 of the Laws of 1925, upon the authority of which this proceeding is brought, is unconstitutional and null and void, in that the constitutional requirement of the Fourteenth Amendment to the Constitution of the United States of due process of law precludes the Legislature from providing generally for continuing actions for judgments in personam against foreign executors or administrators of deceased defendants" (*Rec., fols.* 18, 19).

From this order the petitioners appealed to the Appellate Division of the Supreme Court, First Department, which Court affirmed the order of the Special Term, without opinion, on January 29, 1926. On February 23, 1926, the petitioners appealed to the Court of Appeals from the order of the Appellate Division of the Supreme Court, and the Court of Appeals dismissed the appeal on May 14, 1926, and an order was thereupon entered upon the remittitur of that Court in the office of the Clerk of the County of New York on May 28, 1926, where the record of this pro-

ceeding was lodged at the time when the petitioners applied to this Court for a writ of certiorari.

Under a prior statute relating to the subject of the revival of actions (Section 160 of the Decedents' Estate Law of New York) a similar proceeding to revive the action and to substitute the respondents as defendants in place of George J. Gould, deceased, was denied, and Chapter 253 of the Laws of 1925 having been enacted subsequent to the decision by the Court of Appeals of an appeal in that proceeding, a motion for a reargument was made in that Court on the strength of such statute. The Court adhered to its order upon the ground that it could only review the question that had been certified to it by the Appellate Division under the previous statute, and no other, and that the newly enacted statute had not been, as it could not have been, considered by the Appellate Division, because it was not enacted until after the certificate had been made. The Court of Appeals, however, in 240 N. Y. 379, indicated that it regarded Section 253 of the Laws of 1925 as unconstitutional.

III. After the dismissal by the Court of Appeals of the appeal in the pending proceeding, the petitioners applied to this Court for a writ of certiorari to review the determination of the Courts of the State of New York having jurisdiction in the premises, and on October 18, 1926, the writ prayed for was granted. The only question presented by the record was that which was the sole ground upon which the petitioners' application for the revival of the action and the substitution of the executors of George J. Gould as defendants had been denied, namely, that Chapter 253 of the Laws of New York of 1925 was in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it was adjudged that that statute denied to the respondents due process of law.

The case came on for argument before this Court on October 28, 1927, and the only question presented by the petitioners' brief was the constitutional question.

Thereafter and on January 9, 1928, an order was made by this Court directing the petitioners and the respondents to show cause "why the writ of certiorari heretofore granted in this case should not be dismissed for want of jurisdiction, on the ground that the decree sought to be reviewed in this Court is not a final decree within the meaning of Section 237-b of the Judicial Code, in that it appears that Myron T. Herrick, one of defendants, has not appeared and answered the bill of complaint, and that the cause is still pending as to the said Myron T. Herrick in the Supreme Court of the State of New York and therefore has not been finally and completely determined."

Within the time required by the Court petitioners and respondents submitted briefs on the question of jurisdiction and on March 5, 1928, a decision was rendered by this Court which dismissed the writ of certiorari theretofore granted herein, for want of jurisdiction, as shown by the opinion, a copy of which is hereto annexed.

This Court apparently was of the opinion that under the New York procedure, in order that the Court of Appeals might review the question involved in this proceeding, it was essential that an application for leave to appeal would have to be made to the Appellate Division, and, in case of its refusal, to the Court of Appeals, and that no application having been made to the latter Court, it had no jurisdiction to entertain an appeal herein.

IV. It is respectfully submitted that this Honorable Court has overlooked the fact that under subdivision 1 of Section 588 of the New York Civil Practice Act, an appeal may be taken as of right to the Court of Appeals from a judgment or order entered upon the decision of an Ap-

pellate Division of the Supreme Court which finally determines an action or special proceeding "where is directly involved the construction of the Constitution of the State or of the United States," and that an appeal was taken to the Court of Appeals in the present proceeding pursuant to that provision. It was apparently likewise overlooked that where an appeal may be taken as of right under subdivision 1 of Section 588 of the Civil Practice Act an application for leave to appeal under subdivision 4 of Section 588 is not permitted.

V. In taking the appeal to the Court of Appeals as a matter of right the petitioners' counsel relied upon the decision of this Court in *Southern Electric Co.* v. *Stoddard*, 269 U. S. 186, where it was expressly decided, in a case arising in New York which involved constitutional questions, that because of the fact that constitutional questions were involved, the order of the Appellate Division was appealable as of right to the Court of Appeals, and that failure to take such appeal debarred the allowance of a writ of error from this Court to the Appellate Division.

VI. Your petitioners respectfully submit that under the decision in *Southern Electric Co.* v. *Stoddard*, which is fortified by the decisions rendered by the Court of Appeals in *Matter of Red Cross Line* v. *Atlantic Fruit Co.*, 233 N. Y. 373, and *People ex rel. Astoria Light, Heat & Power Co.* v. *Cantor*, 236 N. Y. 417, their procedure in appealing directly to the Court of Appeals was justified, and that the dismissal of the appeal by that Court, which had previously in 240 N. Y. 379 regarded Chapter 253 of the Laws of 1925 as unconstitutional, was the equivalent of an affirmance, and at all events did not preclude this Court from granting a writ of certiorari.

VII. The record also shows that the respondents, out of abundance of caution, had made an application to the Appellate Division to certify the questions of law for review by the Court of Appeals, pursuant to subdivision 3 of Section 588 of the Civil Practice Act, and that motion was denied. In a case arising under subdivision 3 no application can be made to the Court of Appeals for leave to review.

VIII. The petitioners, therefore, exhausted every possible method for the review of the determination of the Appellate Division which affirmed the order of the Special Term.

IX. Annexed hereto is the brief of the petitioners in support of their petition for a rehearing.

WHEREFORE, your petitioners pray for a rehearing of this cause.

And your petitioners will ever pray.

HENRY W. McMASTER,
FRANCIS H. SKELDING,
by LOUIS MARSHALL,
their Solicitor and Counsel,
as Receivers of the Wabash Pittsburgh Terminal Railway Company.

LOUIS MARSHALL,
Solicitor and Counsel for Petitioners,
120 Broadway, New York City.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

LOUIS MARSHALL, being duly sworn, says that he is the Solicitor and Counsel herein of the petitioners named in the foregoing petition; that he has read the same and knows the contents thereof; that the facts as stated are true to the best of his knowledge, information and belief.

LOUIS MARSHALL.

Subscribed and sworn to before me
this 26th day of March, 1928.

RAPHAEL BRILL,
Notary Public,
(Seal) New York County.

I HEREBY CERTIFY that I am Counsel for the petitioners herein. The aforesaid petition for a rehearing is presented in good faith and not for delay.

LOUIS MARSHALL,
Solicitor and Counsel for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 85.

HENRY W. McMASTER and FRANCIS H. SKELDING, as Receivers of the Wabash Pittsburgh Terminal Railway Company,

Petitioners,

against

GEORGE J. GOULD; KINGDON GOULD and SCHUYLER NEILSON RICE, as Executors of the Estate of George J. Gould, deceased,

Respondents.

PETITIONERS' BRIEF ON PETITION FOR REHEARING.

The facts relating to this application are sufficiently set forth in the petition to which this brief is annexed. It proceeds on the ground that in dismissing the writ of certiorari this Court inadvertently overlooked the terms of subdivisions 1 and 4 of Section 588 of the New York Civil Practice Act and the decision of this Court in *Southern Electric Co.* v. *Stoddard*, 269 U. S. 186, as well

as two decisions of the New York Court of Appeals to the same effect.

Section 588 of the New York Civil Practice Act.

Section 588 of the New York Civil Practice Act as in force in 1925 read as follows:

> "§ 588. Jurisdiction of the court of appeals in civil actions and proceedings. From and after the thirty-first day of May, nineteen hundred and seventeen, the jurisdiction of the court of appeals in civil actions and proceedings shall be confined to the review, upon appeal, of an actual determination made by an appellate division of the supreme court in either of the following cases, and no others:
>
> 1. An appeal may be taken as of right to said court from a judgment or order entered upon the decision of an appellate division of the supreme court *which finally determines an action or special proceeding where is directly involved the construction of the constitution of the state or of the United States*, or where one or more of the justices of the appellate division dissents from the decision of the court, or, having sat in the case, refrains from participating in the decision of the court, or where the judgment or order is one of reversal or modification.
>
> 2. An appeal also may be taken as of right to said court from an order of the appellate division granting a new trial on exceptions where the appellants stipulate that, upon affirmance, judgment absolute shall be rendered against them.
>
> 3. An appeal also may be taken from a determination of the appellate division of the supreme court in any department, *other than from a judgment, or order which finally determines an action or special proceeding, where the appellate division allows the same and certifies that one or more ques-*

tions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals, in which case the appeal brings up for review the question or questions so certified, and no other; and the court of appeals shall certify to the appellate division its determination upon such questions.

4. An appeal also may be taken from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding, *but which is not appealable as of right under subdivision one of this section,* where the appellate division shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals, or where, in case of the refusal so to certify, an appeal is allowed by the court of appeals. Such an appeal shall be allowed when required in the interest of substantial justice.

The provisions of this section shall not apply to an appeal taken to the court of appeals prior to the first day of June, nineteen hundred and seventeen, but an appeal so taken shall be heard and determined under the then existing provisions of law."

POINTS.

I.

The sole question in this proceeding being one which finally determines it, wherein is directly involved the construction of the due process clause of the Fourteenth Amendment to the Constitution of the United States, the appeal by the petitioners to the New York Court of Appeals was taken as of right pursuant to subdivision 1 of Section 588 of the New York Civil Practice Act, and because of that fact the Court of Appeals had no discretionary power under subdivision 4 of Section 588 to allow an appeal to that Court.

The decision of the Special Term of the Supreme Court in this proceeding was rendered on November 16, 1925 (*Rec.*, pp. 3-6). The application to substitute the executors of the estate of George J. Gould, deceased, as parties defendant in the action in the place and stead of George J. Gould, was denied "upon the sole ground that Chapter 253 of the Laws of 1925, upon the authority of which this proceeding was brought, is unconstitutional and null and void in that the constitutional requirement of the Fourteenth Amendment to the Constitution of the United States of due process of law precludes the legislature from providing generally for continuing actions for judgments in personam against foreign executors or administrators of deceased defendants."

An appeal was taken from this order to the Appellate Division of the First Department of the Supreme Court on November 18, 1925 (*Rec.*, pp. 2, 3), and on January 29, 1926, the order of the Special Term was affirmed (*Rec.*, p. 88; 215 App. Div. 811), and on February 11, 1926, an

order was made by the Appellate Division denying leave to appeal to the Court of Appeals from the order of affirmance (*Rec.*, pp. 88, 89; 216 App. Div. 708). On February 23, 1926, an appeal was taken to the Court of Appeals from the order of affirmance by the Appellate Division (*Rec.*, pp. 89, 90), where the appeal was dismissed (242 N. Y. 604).

This procedure was pursued on the authority of various cases about to be considered, including *Southern Electric Co.* v. *Stoddard*, 269 U. S. 186, decided by this Court on November 23, 1925. There, the New York Superintendent of Insurance instituted proceedings to liquidate the business of the Casualty Company of America. In those proceedings the Southern Electric Company presented a claim as a judgment-creditor, asking the payment of a judgment which it had recovered in North Carolina against the Casualty Company, out of the assets in the control of the Superintendent of Insurance. This claim was disallowed by the Supreme Court of New York at Special Term. The order of disallowance was affirmed by the Appellate Division without opinion (207 App. Div. 842). After the affirmance by the Appellate Division of the order of the Special Term, the claimant moved the Appellate Division for leave to appeal to the Court of Appeals. That motion was denied. A writ of error was then sued out to the Supreme Court of the State of New York from the order of affirmance by the Appellate Division. A motion was then made in this Court to dismiss this writ of error on the ground that it had not issued to the court of last resort of the State of New York, as required by Section 237 of the Judicial Code. The motion to dismiss was granted on the opinion of Mr. Justice Taft, the reasoning of which we believe in every way justifies the procedure of the petitioners herein. He says:

> "By the first paragraph of §588 of the Civil Practice Act of New York, an appeal to the Court of

Appeals may be taken as of right from a judgment or order entered upon the decision of the Appellate Division which finally determines an action or special proceeding where is directly involved the construction of the Constitution of the State or of the United States. In this case there is directly involved the construction of the Constitution of the United States, and therefore it would seem that an appeal could have been taken from the Appellate Division as of right to the Court of Appeals, *but this was not done.* Instead, application was made to the Appellate Division to certify that a question of law was involved in the case which ought to be reviewed by the Court of Appeals, and that certificate the Appellate Division declined. Thereafter no application was made to the Court of Appeals to allow an appeal. Paragraph 4 of §588 provides that an appeal may be taken to the Court of Appeals from a judgment or order entered upon the decision of the Appellate Division which finally determines an action or special proceeding, *but which is not appealable as of right under subdivision 1 of the section*, where the Appellate Division shall certify that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals, or where in case of the refusal so to certify an appeal is allowed by the Court of Appeals.

It is said that this order of disallowance could not have been appealed to the Court of Appeals, either under the first or fourth paragraph of §588, because it is not an order entered upon the decision of the Appellate Division which finally determines an action or special proceeding, and that this was so held in the case of *The People* v. *American Trust Company*, 150 N. Y. 117. We find, however, that on December 12, 1922, in the matter of a claim of one Badgley, in this same proceeding for the liquidation of the Casualty Company of America, the Court of Appeals (234 N. Y. 503) entertained an appeal from the Appellate Division of the First Judicial Department, which had reversed an order of the Special Term allowing the claim of the ap-

pellant therein and dismissed the claim. This was not by permission of the Appellate Division and must therefore have been found by the Court of Appeals to be within the 4th paragraph of §588, an order upon a decision of the Appellate Division 'finally determining an action or special proceeding.' *This clearly shows that in the view of the Court of Appeals of New York, if the order of disallowance in this case involved a Federal constitutional question, as it did on this record, it was directly appealable to that court from the Appellate Division under the first paragraph of §588. The claimant has failed to make proper application to the State court of final resort and for that reason the writ must be dismissed.*"

In the case cited in the opinion of Mr. Chief Justice Taft (234 N. Y. 503, affirming *Matter of Phillips*, 197 App. Div. 166), the New York Court of Appeals acquired jurisdiction under subdivision 1 of Section 588 of the Civil Practice Act by an appeal taken as of right from an order of the Appellate Division which reversed the order of the Special Term, since the case came within one of the categories enumerated in the subdivision, namely, an appeal from an order of reversal, as to which the same rule applies as in a case "which directly involves the construction of the Constitution of the State or of the United States."

In other words, this Court held in Southern Electric Co. v. *Stoddard that, because the claimant in the case cited did not take an appeal under subdivision 1 of Section 588 of the Civil Practice Act to the Court of Appeals from the Appellate Division, the writ of error would not lie.*

Seeking to profit by this example, the petitioners in the present case in due time appealed directly to the Court of Appeals from the determination of the Appellate Division, in view of the fact that the construction of the Four-

teenth Amendment to the Constitution of the United States was directly involved. *What was not done by the plaintiff-in-error in Southern Electric Co.* v. *Stoddard, was done by the petitioners in the present case.* In both the construction of the Constitution of the United States was involved. The Southern Electric Company did not appeal directly to the Court of Appeals. The petitioners in the present case did, basing their right upon the express language of subdivision 1 of Section 588 of the Civil Practice Act, which *alone* permitted a resort to the Court of Appeals.

The petitioners have brought themselves directly within the terms of that subdivision. *Subdivision 4 did not apply, because by its express terms it limited the right of appeal thereunder to a case "which is not appealable as of right under subdivision one of this section." The very fact which brought the case under subdivision 1 excluded it from subdivision 4.*

The petitioners did apply for a certificate under subdivision 3 to the Appellate Division. In a case coming within the purview of that subdivision, no application can be made to the Court of Appeals for such a certificate in the event of a refusal by the Appellate Division. Thereupon, having in the meantime discovered the distinction pointed out by this Court in *Southern Electric Co.* v. *Stoddard,* the petitioners pursued the only course that lay open to them for exhausting their remedy in the Court of Appeals, by taking an appeal under subdivision 1 of Section 588. Why that Court dismissed the appeal instead of affirming the order appealed from is not apparent. No opinion or memorandum was written. It may be surmised that, in view of its opinion in 240 N. Y. 379, it saw no occasion for further discussion and disposed of the case in the manner that it did. At all events, the case was properly before it and it rendered a decision adverse

to the petitioners. Thereupon they were justified in asking for a writ of certiorari for the review of the determination by all the New York courts before which the case had been or could be brought, which was adversely to them on the sole question in the case, namely, the construction of the due process clause of the Fourteenth Amendment as applied to Chapter 253 of the New York Laws of 1925, and this Court granted the writ of certiorari, the record having previously been remitted by the Court of Appeals to the Clerk of the Supreme Court in and for the County of New York.

That the petitioners' procedure was in every way justified likewise appears from *Matter of Red Cross Line* v. *Atlantic Fruit Co.*, 233 N. Y. 373, and *People ex rel. Astoria Light, Heat & Power Co.* v. *Cantor*, 236 N. Y. 417.

In *Matter of Red Cross Line* v. *Atlantic Fruit Co., supra,* an application was made by the Red Cross Line for an order of arbitration. The appellant invoked provisions of the Federal Constitution in opposition to the granting of the order, thereby making the provisions of the Constitution the subject of construction. The Appellate Division affirmed the order of the Special Term which granted the arbitration. The Atlantic Fruit Company thereupon appealed to the Court of Appeals, without permission, from the unanimous affirmance of the Appellate Division. The plaintiff claimed that this appeal was not warranted, but the Court of Appeals decided that it was under what was then subdivision 1 of Section 190 of the Code of Civil Procedure, but which afterwards became subdivision 1 of Section 588 of the Civil Practice Act.

In *People ex rel. Astoria H., L. & P. Co.* v. *Cantor,* supra, precisely the same situation existed. The validity of an assessment was involved, the appellant relied upon

the provisions of the Federal Constitution, the Special Term and the Appellate Division rejected its contentions, and thereupon, without permission, the relator appealed to the Court of Appeals. Dealing with the objection made to its right to review, Chief Judge Hiscock said (p. 420):

> "The question argued by appellant involves a construction and interpretation of provisions of the Federal Constitution and, therefore, the appeal lies *although no permission was obtained.*"

In the opinion of this Court on the dismissal of the writ in the present case, it is said:

> "Subdivision 1 [of §588 of the Civil Practice Act] provides that such an appeal may be taken 'as of right' in certain classes of cases. Subdivision 4 provides that where such an appeal does not lie as of right under subdivision 1, it may be taken where the Appellate Division certifies that in its opinion a question of law is involved which ought to be reviewed, or where, in case of the refusal so to certify, an appeal is allowed by the Court of Appeals. To obtain such a discretionary appeal application may be made to the Appellate Division for leave to appeal, and in case of refusal, to the Court of Appeals. * * * And when an appeal which is not a matter of right is taken without leave it must be dismissed."

But it seems to have been overlooked that under subdivision 1 of Section 588 an appeal *may be taken as of right* to the Court of Appeals from a judgment or order entered upon the decision of an Appellate Division of the Supreme Court which finally determines an action or special proceeding "where is directly involved the construction of the Constitution of the State or of the United States." That precisely describes the present case, for the orders of the Special Term and of the Appellate Divi-

sion finally determined the special proceeding taken by the petitioners for the revival of the action which had abated on the death of George J. Gould and for the substitution of Gould's executors in his place. Consequently, *because* this case came *within* subdivision 1 of Section 588, it was *excluded* from *subdivision 4 of Section 588*. The petitioners therefore could not have invoked the discretion of the Court of Appeals, since the *right* to take an appeal to that Court had been expressly conferred upon them by subdivision 1 of Section 588.

The cases cited in the opinion in support of the conclusion reached are:

People v. *Trimarchi*, 231 N. Y. 263.
Pillsbury Flour Mills Co. v. *Nicotera*, 234 N. Y. 534.
Matter of Schmidt, 236 N. Y. 645, 646.
Donovan v. *Cunard Steamship Co.*, 236 N. Y. 651.
Johnson v. *Whaley*, 239 N. Y. 570, 571.

People v. *Trimarchi, supra*, did not come within the terms of subdivision 1 or 4 of Section 588 of the Civil Practice Act, or of Section 190 of the Code of Civil Procedure, of which the former was a re-enactment. No constitutional question was involved and there was a unanimous affirmance by the Appellate Division of the order of the Trial Court denying the motion for a new trial, on the ground of newly discovered evidence, made in that Court.

Pillsbury Flour Mills Co. v. *Nicotera, supra*, involved an attempted appeal from a judgment of the Appellate Division which unanimously affirmed a judgment in favor of the plaintiff entered upon a verdict. The judgment was one from which an appeal to the Court of Ap-

peals did not lie as of right. Hence no appeal could be taken to that Court without permission.

Matter of Schmidt, supra, and *Donovan* v. *Cunard Steamship Co., supra,* were of precisely the same character.

In *Johnson* v. *Whaley, supra,* there was likewise a unanimous affirmance by the Appellate Division of a judgment entered by the Court at Trial Term. The memorandum distinctly shows that the Court of Appeals dismissed the appeal "on the ground that no permission to appeal was obtained and no constitutional question was directly involved within the meaning of Section 588 of the Civil Practice Act." If such a question had been involved, then, within the express terms of subdivision 1 of Section 588, an appeal could have been taken as of right, as was done in the present case.

In *Sultzbach* v. *Sultzbach,* 238 N. Y. 348, which is likewise cited in the opinion of this Court in the present case, the Special Term dismissed the complaint for insufficiency. On appeal from its order, the Appellate Division affirmed, granting plaintiff leave to serve a further amended complaint within twenty days. Plaintiff not having taken advantage of this permission, an order was entered by the Special Term dismissing the complaint, followed by final judgment. From this final judgment the plaintiff appealed to the Court of Appeals, without having obtained leave of the Appellate Division. Considering these facts, Judge Crane said:

> "The appeal, however, brings up for review only the determination of the Appellate Division. This determination, however, was an unanimous affirmance. *Section 588 of the Civil Practice Act specifies the cases which may be brought to this court after an unanimous affirmance without leave to appeal being granted, either by the Appellate Division or by this court. This case is not one of them.*"

The case now before this Court comes within subdivision 1 of Section 588, and, therefore, the case was not one in which leave to appeal could be applied for under subdivision 4, since, under subdivision 1, an appeal could be taken as of right because of the constitutional question involved, which, moreover, was the only question in the case.

In *Newman* v. *Gates*, 204 U. S. 89, referred to in the opinion of the Court in this case, the highest Court of Indiana dismissed the appeal taken to it because of defective parties, and did not pass on the merits of the case. The case, therefore, stood as though no appeal had been taken to that Court.

In the present case there is nothing to indicate that the Court of Appeals dismissed the appeal on any ground extrinsic of the constitutional question involved in the case. It wrote no opinion, and the record showed that the Court at Special Term had denied the petitioner's prayer for relief on the sole ground that the statute on which they proceeded (Chapter 253 of the Laws of 1925) was unconstitutional as being in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The Court of Appeals had previously, in 240 N. Y. 379, considered that statute on the motion for reargument in the first proceeding instituted by the petitioners for a revival of the action and the substitution of Gould's executors as defendants, and had indicated its opinion that the act was unconstitutional, although it merely decided that the question which had been certified to it under a previous statute, which differed materially from Chapter 253 of the Laws of 1925, and no other, could be passed upon by it, since Chapter 253 of the Laws of 1925 was enacted subsequent to the decision by the Appellate Division in the first proceeding. It is therefore evident that the Court of Ap-

peals, knowing that the Special Term had based its decision upon the opinion in 240 N. Y. 379, which intimated that the act was unconstitutional, adhered to that opinion and thus finally disposed of the appeal. The fact that it took the form of a dismissal rather than of an affirmance under the circumstances seems immaterial.

II.

For the reasons herein set forth it is respectfully prayed that a rehearing be granted.

LOUIS MARSHALL,
Petitioners' Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 85.—October Term, 1927.

Henry W. McMaster and Frances H. Skelding, as Receivers of the Wabash Pittsburgh Terminal Railroad Company, Petitioners, *vs.* George J. Gould, Kingdon Gould, et al., as Executors, etc.	On Writ of Certiorari to the Supreme Court of the State of New York.

[March 5, 1928.]

Mr. Justice Sanford delivered the opinion of the Court.

This record presents a preliminary question as to our jurisdiction under the writ of certiorari.

The petitioners brought an action in equity in the Supreme Court of New York against George J. Gould and others for an accounting of syndicate funds. Gould having died before the trial, the petitioners, proceeding under a rule to show cause, moved for an order substituting the respondents, the executors of his estate, as parties defendant, and reviving the action as against them. The court denied this motion and dismissed the rule to show cause; and this was affirmed by the Appellate Division, without opinion. 215 App. Div. 811. The petitioners moved the Appellate Division "for leave to appeal to the Court of Appeals." This was denied. The petitioners then took an appeal without leave. This was dismissed by the Court of Appeals, without opinion. 242 N. Y. 604.

The petitioners contend that although the judgment of the Appellate Division does not finally and completely dispose of the entire action, it is nevertheless a "final judgment" which may be reviewed under § 237 (b) of the Judicial Code, as it is a "final" and complete judgment in an ancillary and "independent proceeding" to revive the action against the respondents. The respondents contend that, even if this be so, it is not, under that section, the judgment of the highest court of the State in which a decision could be had, since the petitioners did not apply to the Court of Appeals for leave to appeal.

Sec. 588 of the New York Code of Civil Practice authorizes the taking of an appeal to the Court of Appeals from a judgment or order of the Appellate Division "which finally determines an action or special proceeding." Subd. 1 provides that such an appeal may be taken "as of right" in certain classes of cases. Subd. 4[1] provides that where such an appeal does not lie as of right under Subd. 1, it may be taken where the Appellate Division certifies that in its opinion a question of law is involved which ought to be reviewed, or where, in case of the refusal so to certify, an appeal is allowed by the Court of Appeals. To obtain such a discretionary appeal application may be made to the Appellate Division for leave to appeal, and in case of refusal, to the Court of Appeals. See § 591; *Sultzbach* v. *Sultzbach*, 238 N. Y. 353, 355. And when an appeal which is not a matter of right is taken without leave, it must be dismissed. *People* v. *Trimarchi*, 231 N. Y. 263, 268; *Pillsbury Flour Mills Co.* v. *Nicotera*, 234 N. Y. 534; *Matter of Schmidt*, 236 N. Y. 645, 646; *Donovan* v. *Cunard Steamship Co.*, 236 N. Y. 651; *Johnson* v. *Whaley*, 239 N. Y. 570, 571.

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[1] Changed to Subd. 5 by Laws of 1926, ch. 725.

Assuming the correctness of the petitioners' contention that the judgment of the Appellate Division is a "final" determination of an independent proceeding to revive the action against the respondents, the dismissal by the Court of Appeals of the appeal sued out without leave, must be taken, nothing else appearing, as a holding by that court that the case was not one in which an appeal lay as a matter of right. And since the petitioners, when the Appellate Division refused them leave to appeal, did not make an application to the Court of Appeals for such leave, the judgment is not that of the highest court of the State in which a decision could be had. See *Newman* v. *Gates*, 204 U. S. 89, 95. In any respect we are without authority to review the judgment; and the writ is

Dismissed for want of jurisdiction.

Mr. Justice STONE did not sit in this case.

FILED
AUG 6 1926
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 4[redacted]85

HENRY W. McMASTER and FRANCIS H. SKELDING, as Receiver of the Wabash Pittsburgh Terminal Railway Company,

Petitioners,

against

GEORGE J. GOULD; KINGDON GOULD and SCHUYLER NEILSON RICE, as Executors of the Estate of George J. Gould, deceased,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WILLIAM WALLACE, JR.,
Respondents' Counsel.

Gallo & Ackerman, Inc., 6 Church St. & 107 Liberty St., 'Phones Rector 7257–8.

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Supreme Court of the United States

OCTOBER TERM, 1926.

No.

HENRY W. MCMASTER and FRANCIS H. SKELDING, as Receivers of the Wabash Pittsburgh Terminal Railway Company,

Petitioners,

against

GEORGE J. GOULD; KINGDON GOULD and SCHUYLER NEILSON RICE, as Executors of the Estate of George J. Gould, deceased,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioners seek review by this Court of a determination of the Supreme Court of the State of New York *refusing* to assume jurisdiction over *foreign* executors. In opposition, respondents urge that:

1. The petition is too late.
2. The matter decided was not of general interest or public concern.
3. No federal question is available to petitioners.
4. The question here presented has been repeatedly decided by this Court adversely to the contention of petitioners.

Statement.

This action was begun in the Supreme Court of the State of New York in September, 1910. George Gould, a defendant therein, died on May 16, 1923, a citizen of New Jersey, where his will was probated on June 4, 1923. These respondents, named as executors in his will, were appointed as such by the Court in which that will was probated.

On December 24, 1923, petitioners secured an order of the Special Term, Part III of the Supreme Court of New York to show cause why respondents should not be substituted as defendants in place of their deceased testator. Appearing specially and solely therefor, respondents moved to vacate the above order and the service thereof. On February 13, 1924, their motions were denied, and their substitution ordered by the Special Term.

Respondents appealed from that order to the Appellate Division of the Supreme Court, which on July 2, 1924 (210 App. Div., 806), reversed the Special Term, set aside the order of substitution, and dismissed the order to show cause, on an (adopted) opinion in Rogers vs. Gould, 210 App. Div., 15.

On September 11, 1924, petitioners appealed as of right from the last named order of the Appellate Division to the Court of Appeals. On October 10, 1924, they applied for and secured leave of the Appellate Division to appeal on certified questions.

On January 21, 1925, the Court of Appeals without opinion affirmed the decision of the Appellate Division. Before the remittitur went down, and on April 1, 1925, an Act of the legislature of New York was passed amending Section 160 of the Decedent Estate Law.*

*This Act (Chap. 253, Laws, 1925) is the one on which the proceeding here sought to be reviewed was based.

On April 14, 1925, *because of this new statute*, petitioners moved for a reargument in the Court of Appeals. On May 12, 1925, their motion was granted. After reargument, and on July 15, 1925, the Court of Appeals rendered its final decision affirming the Appellate Division (Record, fols. 199-218; 240 N. Y., 379).

On October 19, 1925, petitioners began a second proceeding in the Special Term of the Supreme Court, by a second order to show cause (Record, fols. 23 to 27). On October 24, 1925, respondents, again specially appearing, moved to vacate this order and service (Record, fols. 97-102); which motion on November 2, 1925, was granted by the Special Term on the authority of the above decision of the Court of Appeals (Record, fols. 221-222).

On January 29, 1926, the Appellate Division affirmed the above order of the Special Term (Record, fols. 228-229). Thereupon petitioners moved the Appellate Division for leave to appeal to the Court of Appeals from the last named order. Leave to so appeal was denied by the Appellate Division on February 11, 1926 (Record, fols. 234-235). A copy of this order was served on the attorneys for petitioners on February 20, 1926.* By notice dated the day after this service (February 23, 1926), petitioners then undertook to appeal as of right to the Court of Appeals. That appeal was dismissed by the Court of Appeals, without opinion, on May 14, 1926 (Record, fols. 237-242; 152 N. E., 446).

On May 28, 1926, and on remittitur from the Court of Appeals, its order of dismissal was entered as the order of Special Term, Part II of the Supreme Court. This

*This fact does not appear in the record filed here by petitioners. Under the practice, admission of service is taken on the copy served and the latter is retained in the serving attorney's office. An affidavit identifying a photostat copy of the served order has been lodged with the Clerk of this Court as proof of such service.

petition was filed in the office of the Clerk of this Court, July 1, 1926. It prays for a writ directed to the *Supreme Court* of the State of New York to review the decision of the "highest courts" of that state.

ARGUMENT.

First.

The Petition is Too Late.

POINT I.

There can be but ONE "Highest Court" within the meaning of the certiorari statute.

(a) By using the plural "courts" in the phrase (in their petition)

> "for a writ of certiorari to be directed to the *Supreme Court* of the State of New York * * * to review the determination herein of the *highest courts* of the state," etc.,

petitioners would amplify their applification beyond the scope of the law. The writ runs to but *one* court and *its* record and decision only will be reviewed. If there were any higher court having jurisdiction, petitioners should have prayed for a writ of *that* court.

In *Gregory* vs. *McVeigh*, 23 Wall. (U. S.), 294, this court said:

> "The Court of Appeals is the highest court in the State of Virginia. If a decision of a suit could be had in that court, we must wait for such a decision before we can take jurisdiction, and *then can only examine the judgment of that court.* If, how-

ever, the suit is one of which that court cannot take jurisdiction, we may *re-examine the judgment of the highest court* which, under laws of the State, could decide it." *

POINT II.

A petition not filed within the time prescribed by law, will be dismissed for that reason alone.

The Act of February 13, 1925, Chapter 229, Section 8, (a) declares:

> "No writ * * * of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made *within three months* after the entry of *such* judgment or decree." **

1. In *Rust Land Co.* vs. *Jackson,* 250 U. S., 71, a verdict and judgment of a state trial court was affirmed in the State Supreme Court without opinion, after a motion to continue the appeal in the State Supreme Court, until the disposition in this court of an original action between Alabama and Mississippi, had been first granted and then denied. The defeated party sued out a writ of error from this Court to the Supreme Court of the state. Just before the argument on that writ in this court it also pe-

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*All italics in this brief are the writer's.

**The earlier act of September 6, 1916 (39 Stat., 728), reads:

> " No writ of * * * certiorari, intended to bring up any cause for review by the Supreme Court, shall be allowed or entertained, unless duly applied for within three months after entry of *the judgment of decree complained of.*"

Inasmuch as the two acts are substantially similar the cases decided under the Act of 1916 are applicable also to the Act of 1925.

titioned for certiorari to the State Court. After holding the case not reviewable on writ of error, this Court said:

> "On the eve of the argument a writ of certiorari was applied for; but as this was long after the expiration of the three months' limited by Section 6 of the Act of September 6, 1916, the application cannot be entertained, irrespective of whether the record shows a proper case for the allowance of that writ."

In *Citizens Bank* vs. *Opperman,* 249 U. S., 448, plaintiff recovered a judgment which was affirmed by the Supreme Court of Indiana. Motion for rehearing in that Court was overruled on May 18, 1917. The petition for certiorari was presented in this Court on April 15, 1918. Subsequently, in disposing of a separate writ of error in the same case, this Court said (pages 449, 450):

> "The Act of September 6, 1916, c. 449, 39 Stat., 726, 727, 728, * * *.
>
> * * * distinctly directed that * * * 'no writ of error, appeal, or writ of certiorari intended to bring up any cause for review by the Supreme Court shall be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of.' Where a petition for rehearing is entertained the judgment does not become final for purposes of our review until such petition has been denied or otherwise disposed of *and the three months' limitation begins to run from date of such denial or other disposition.*
>
> Plaintiff-in-error presented its petition here for a writ of certiorari to bring up the present cause April 15, 1918; this was denied April 22, 1918. Manifestly, the application was not within the prescribed time."

POINT III.

Even if otherwise reviewable here, a petition to review the final judgment of the State Supreme Court, to which petitioners ask that this writ be directed, could not be considered, if filed in this court after June 22, 1926.

(a) This petition, filed with the Clerk of this Court on July 1, 1926, prays for a writ of certiorari directed to the *Supreme Court* of the State of New York,

> "to review the determination of the highest *courts* of New York * * * denying petitioner's motion for substitution,"

and granting respondents' cross motion to vacate the services of the order to show cause, and the order itself. These orders were first entered in the Special Term of the State Supreme Court on November 16, 1925. The petitioners appealed from those orders to the Appellate Division of the Supreme Court, where they were affirmed on January 29, 1926.

Leave to appeal to the Court of Appeals was denied by the Appellate Division on February 11, 1926. The order denying such leave was served on petitioners on February 20, 1926. They never applied to the Court of Appeals for leave to appeal. Instead on February 23, 1926, they attempted to appeal as of right. That appeal was dismissed May 14, 1926.

(b) *Any further appeal from the judgment of the Appellate Division of January* 29, 1926, *was not of right, but only by favor of the Appellate Division; or of the Court of Appeals, on application to the latter within thirty days after the service of the refusal order of the Appellate Division.*

Under the New York statute, there was no jurisdiction in the Court of Appeals to review the decision of the

Appellate Division, unless leave had been granted by (1) of the Appellate Division, or (2) the Court of Appeals (Civil Practice Act, Secs. 588, 591).

The Appellate Division unanimously affirmed the order of the Supreme Court (Record, fols. 226-230). Subdivision 1 of Section 598, Civil Practice Act, provides:

> ("*Jurisdiction of the court of appeals in civil actions and proceedings.*) *Appeals may be taken to the court of appeals in civil cases and proceedings as follows*:
>
> 1. As of right from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or, having sat in the case, refrains from participating in the decision of the court, or where the judgment or order is one of reversal or modification."

Subdivision 4 of that section in February and March, 1926, provided:

> "4. An appeal also may be taken from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding, but which is not appealable as of right under subdivision one of this section, where the appellate division shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of

appeals, or where, in case of the refusal so to certify, an appeal is allowed by the court of appeals. Such an appeal shall be allowed when required in the interest of substantial justice." *

The following cases hold that there can be no appeal as of right to the Court of Appeals from an order entered upon the unanimous decision of the Appellate Division unless leave has been granted:

Johnson vs. *Whaley*, 239 N. Y., 570.
L'Ecvluse vs. *Brokaw*, 238 N. Y., 611.
Sultzback vs. *Sultzback*, 238 N. Y., 353.
McGraw vs. *Halliday*, 236 N. Y., 578.
Pillsburys Flour Mills Co. vs. *Nicotera*, 234 N. Y., 234.

Under Section 591, Civil Practice Act, petitioners had thirty days after service of such order to apply to the Court of Appeals for such leave. These petitioners did not do this. Their notice of appeal to the Court of Appeals, dated February 23, 1926, was but an idle gesture. The Court of Appeals, therefore, properly dismissed the appeal.

---

*Section 588 of the Civil Practice Act as am'd by L., 1926, ch. 725, in effect May 4, 1926, reads:

"Appeals may be taken to the court of appeals in civil cases and proceedings as follows: * * *

5. From a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding, but which is not appealable under subdivision one of this section, where the appellate division shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals, or where, in case of the refusal so to certify, an appeal is allowed by the court of appeals. Such an appeal shall be allowed when required in the interest of substantial justice."

This Court, of course, is not concerned with whether the Court of Appeals properly or improperly concluded that it had no jurisdiction. As shown in (d) *infra* the dismissal by the Court of Appeals is presumed by this Court to have been predicated upon lack of jurisdiction.

(c) *Failure to apply to the Court of Appeals on or before March* 22, 1926, *for leave to appeal, cut off the discretionary appeal. In every case of discretionary review the refusal by the tribunal having the discretion, to accord a review, or the failure to request the privilege within the prescribed time, makes the judgment final, from the refusal or time-expiration date.*

In *American Railway Express Co.* vs. *Levee,* 263 U. S., 19, plaintiff recovered a judgment which was affirmed by the Court of Appeal of Louisiana. (That court corresponds to the Appellate Division of the Supreme Court of New York, while the Supreme Court of Louisiana corresponds to the Court of Appeals of New York.) The affirmance was final, unless the Supreme Court, in its discretion should allow a review. The defeated party applied for such a review; but that court refused it. The case came up to this Court upon certiorari addressed to the intermediate Court of Appeal. Upon the question of the commencement of the period within which application to this Court for certiorari must be made, it said (pages 20, 21):

> "A preliminary objection is urged that the present writ of certiorari was addressed to the Court of Appeal and not to the Supreme Court. But under the Constitution of the State the jurisdiction of the Supreme Court is *discretionary,* Art. 7, §11, and although it was necessary for the petitioner to *invoke that jurisdiction in order to make it certain that the*

case could go no farther (*Stratton* vs. *Stratton*, 239 U. S., 55), when the jurisdiction was declined the *Court of Appeal was shown to be the highest Court of the State in which a decision could be had.* • • • *Of course, the limit of time for applying to this Court was from the date when the writ of certiorari was refused*" (by the State Supreme Court).

In *Fisher* vs. *Perkins*, 122 U. S., 522, plaintiff recovered in the Circuit Court of Daviess County, Ky. The *Superior Court* affirmed the judgment. The case came up to this Court on a Writ of Error directed to the Superior Court. In granting the motion to dismiss the Writ, this Court said (pages 525, 527):

"To get an appeal from the Superior Court in any case an *application therefor must be made to and granted by that court.* • • • Certainly it would not be claimed that a judgment of the Superior Court could be reviewed by this court in a case not within the exceptions mentioned in §5 before an application had been made in proper time for the allowance of an appeal, and the application refused for some sufficient reason. • • •

Here, if an application to the Superior Court for an appeal *had been refused*, the doors of the Court of Appeals would have been closed against the suit, *and we could have proceeded accordingly.*"

In *Bergemann* vs. *Backer*, 157 U. S., 655, Bergemann was convicted of murder in the Court of Oyer and Terminer of Morris County, N. J. He made application for habeas corpus to the Circuit Court of the United States for the District of New Jersey. This was denied. In affirming the judgment this Court said:

> "If the proceedings in the Court of Oyer and Terminer could not, under the laws of New Jersey, be reviewed in a higher court of that State, except upon the allowance of a writ of error by *such court* or by *some judge*, and if such allowance was refused, then the judgment of the court of original jurisdiction was, within the meaning of the acts of Congress, the judgment of the highest court of the State in which a determination of the case could be had, etc."

Without reviewing them in detail many succeeding decisions of this Court are to the same effect.

See

Bacon vs. *Texas*, 163 U. S., 207.
Mullen vs. *Western Union Beef Co.*, 173 U. S., 116.
M. K. & T. Ry. vs. *Elliott*, 184 U. S., 530.
W. U. T. Co. vs. *Hughes*, 203 U. S., 505.
Sullivan vs. *Texas*, 207 U. S., 416.
Norfolk Turnpike Co. vs. *Va.*, 225 U. S., 264.
W. U. T. Co. vs. *Crovo*, 220 U. S., 364.
Stratton vs. *Stratton*, 239 U. S., 55.
2nd Nat. Bank vs. *1st Nat. Bank*, 242 U. S., 600.
Cuyahoga R. P. Co. vs. *Northwestern R. Co.*
Andrews vs. *Virginian Ry. Co.*, 248 U. S., 272.
Mergenthaler L. Co. vs. *Davis*, 251 U. S., 256.

The fundamental principle is that the doing of the act which *the law makes effective* to foreclose further review of a judgment in the state courts, makes that judgment final within the meaning of the federal statutes providing for review in this Court.

In *Gregory* vs. *McVeigh*, 23 Wall. (U. S.), 294, this Court thus declared that principle:

"Thus the doors of the Court of Appeals have been forever closed against the suit; not through neglect, but in the regular order of proceeding under the law governing the practice."

See also *Citizens Bank* vs. *Opperman*, 249 U. S., 448 cited under Point II (supra).

(d) *The dismissal by the Court of Appeals, without opinion, of the attempted appeal as of right, is presumed to have been due to lack of jurisdiction.*

In *Western Union Telegraph Company* vs. *Hughes*, 203 U. S., 505, defendant prosecuted a writ of error to the State Supreme Court of Appeals from a judgment of the Corporation Court of Danville, Virginia, which writ was *dismissed*. He then secured a writ of error from this Court to the Supreme Court of Appeals. In dismissing that writ this Court said (pages 506, 507):

"Treating the order of dismissal as a final judgment we are now asked on this writ of error to reverse the ruling of the Supreme Court of Appeals of Virginia. This, however, we cannot do. It is immaterial that the Supreme Court of Appeals was vested by the state constitution with appellate jurisdiction in all cases involving the constitutionality of a law as being repugnant to the constitution of Virginia or of the United States, or that in the opinion delivered by the court it discussed the Federal question and declared it to be without merit. *The fact is undoubtedly that the writ of error was dismissed solely and expressly because of a want of jurisdiction,* and the effect of the formal entry, adjudging that the court was without jurisdiction to pass upon the questions presented by the writ of

error, *cannot be different from what it would have been had the court not given expression to its views in a written opinion.*"

(e) *Petitioners may not by an unauthorized appeal extend their time to apply to this Court.*

Because of the presumption last stated, the dismissal, without opinion, has the same force as if the Court of Appeals had ordered the dismissal in an opinion expressly declaring that it never had any jurisdiction of the case, and that the judgment sought to be appealed, had become final on March 22, 1926. Whether declared, or implied, this was the situation under the laws of New York.

This court will not reverse the Court of Appeals of New York in the latter's declaration of its lack of jurisdiction.

This unauthorized appeal was as idle as though it had never been attempted. No one may gain a right out of his own wrong. Were it otherwise any suitor in any case made final in a given court, by attempting a review in a higher court, would gain an additional right to an extended period of time for attempted review in this court. If he could do this once, he could do it successively till checked in the state courts by contempt proceedings,—thus setting at naught the time limit of the federal statute.

(f) *The order of the Special Term of the Supreme Court under its remittitur on the dismissal did not extend petitioner's time.*

The entry on May 28, 1926, in the Special Term as its own order, of the order of dismissal by the Court of Appeals, gave no new effect or force to the orders of the Special Term of November, 1925. These were made

final by the decision of the Appellate Division, and the cutting off of the discretionary review. For like reason that order of dismissal gave no new or added effect to the decision of the Appellate Division as the same stood on and after March 22, 1926.

This Court has definitely declared that an entry in the lower court, under mandate from the appellate court, has no effect to toll the period within which certiorari must be applied for. In *Boylan* vs. *United States*, 257 U. S., 614, in dismissing writ of error, that Court said:

> "Dismissed for want of jurisdiction due to failure to apply for writ of error within the statutory period, which began with the date of the entry of the final judgment of the Circuit Court of Appeals, *to which the writ of error issued, and not the date of the entry of judgment in the District Court under the mandate of the Circuit Court of Appeals.*"

(g) *Petitioners get no advantage by the use of the plural "courts" in their petition.*

The Judiciary Act authorizes the bringing up for review and determination by certiorari, of "any judgment or decree * * * rendered or passed by the *highest court of the State in which a decision* could be had." No other judgment than that of the Appellate Division of January 29, 1926, could be reviewed under the writ as herein applied for; and the artless use of the words "courts" in the petition could not extend the scope of the writ (See Point I, supra).

SECOND.

The decision of the Supreme Court of New York to which court petitioner seeks a writ is not the final decision of the highest Court of that State on the question involved. Such final decision was rendered on July 15, 1925, by the Court of Appeals.

(a) Had the only proceeding to substitute these New Jersey executors been the one begun October 9, 1925 (which culminated in the decision by the Appellate Division of the Supreme Court, rendered January 29, 1926), the writ (if otherwise timely and available) should run, as the petition prays, to the Supreme Court, or rather to the Appellate Division of that Court. In fact, however, this was a *second* proceeding with the same object as the first.

The first proceeding was begun by an order to show cause issued in the Special Term, December 23, 1923, and was ended by the decision of the Court of Appeals of July 15, 1925 (240 N. Y., 379).

The second proceeding was begun by an order to show cause (in the same form as the first order of 1923), and issued from the same Court in the same cause, October 9, 1925. In this second proceeding the steady refusal to grant relief was based on the Court of Appeals' decision in the first proceeding.

If the Court of Appeals, in the final decision of July 15, 1925, under the first proceeding, decided the same question now sought to be presented to this Court, then that was the decision to have been reviewed, and against which petitioners should have prayed for the writ; and their time to have prayed for that writ would have expired October 15, 1925.

(b) The question decided in the two proceedings was the same.

In their petition to this Court (page 8) petitioners say that the motion resulting "in the determination now under review was * * * on the *sole basis* of this amendment." That amendment is copied immediately above in the printed petition; and is Chapter 253, Laws of 1925, New York, amending Section 160, Decedent's Estate Law.

On the same page the petition declares that this "second motion was denied on the sole ground that the statute, *on the authority of which the proceeding was brought, was unconstitutional,*" etc. So much for the basis, the purpose, and the result of the second proceeding.

As to the first proceeding. Fourteen days after the approval of Chapter 253, in their motion for reargument in the Court of Appeals, in the first proceeding, petitioners said they made the motion

> "on the ground that Chapter 253 * * * entitles appellant herein to a reversal of the order of the Appellate Division, and to the affirmance of the order of the Special Term," etc. (Record, fols. 181, 182).

In this affidavit supporting the above motion the attorney for petitioners, after quoting Chapter 253, said:

> "It is earnestly prayed that a reargument may be granted in order that there may be an early determination as to the rights of the parties in the light of the enactment of Chapter 253" (Record, fols. 183, 184).

While, in his brief supporting the same motion, he said:

> "It is our contention that Chapter 253 controls the questions as to whether or not this action abated as against George J. Gould upon his death, and whether his Executors appointed in the State of New Jersey, where he was domiciled, may be substituted as defendants herein in his stead * * *. We contend that Chapter 253 * * * gives that power" (Record, fols. 184, 185).

Petitioners made the same contention on the reargument in the Court of Appeals. Respondents contended the statute was neither applicable nor constitutional. That Court of Appeals, in its final decision, held the same (Record, fols. 186, 193; 240 N. Y., 379).

The object of the reargument in the Court of Appeals was to secure compulsory substitution under Chapter 253. The object of this second proceeding was the same. Success in either proceeding would have produced such a compulsory substitution. So directly was the question sought to be reviewed in this Court, decided in that final decision of the Court of Appeals in the first proceeding for substitution, that each, the Special Term, and the Appellate Division, disposed of the *new* proceeding solely on the authority of that decision.

(c) Instead of petitioning for a review of that decision petitioners started the proceeding for substitution all over again, claiming (to avoid the three months bar) that the part of the decision holding that Chapter 253 was unconstitutional, was but a dictum—wherefore, however clear and direct the expression in that regard was, there was no determination. Unhappily both

reason and decided cases are against this present contention of petitioners.

(d) Two grounds for its opinion were announced by the Court of Appeals. Either would have determined the case. Under such circumstances neither ground is a dictum. This is the settled law of this Court and in the State of New York.

In *O'Brien* vs. *Union Central Life Ins. Co.* (1912), 207 N. Y., 180, the Court said (page 186):

> *"It cannot be said that a case is not authority on one point, because, although that point was properly presented and decided in the regular course of the consideration of the cause, some other point was also considered and decided which was alone sufficient to dispose of the whole issue* (*Railroad Companies* vs. *Schutte,* 103 U. S., 118)."

In *Railroad Companies* vs. *Schutte* (1880), 103 U. S., 118, the Court said (page 143):

> "It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended."

In *Union Pacific Co.* vs. *Mason City Co.* (1905), 199 U. S., 160, the Court said (page 166):

> "Of course, where there are two grounds upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other. Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere dictum."

In *United States* vs. *Chamberlain* (1910), 219 U. S., 250, the Court said (page 261):

> "The statute, in the *Savings Bank* case, contained a provision (now in §3213, Rev. Stat.) which expressly authorized the bringing of an action. But the court also found a sufficient basis for its judgment in the general power of the Government to collect by suit taxes that are due, where the statute imposing the tax does not deny that remedy. This point was presented, considered and decided in the determination of the cause and the decision is none the less authoritative because there was another ground for the ultimate conclusion. *Railroad* vs. *Schutte*, 103 U. S., page 143; *Union Pacific Co.* vs. *Mason City Co.*, 199 U. S., page 166."

The application of the above principles and decisions to the case at bar is clear.

The constitutionality of Chapter 253 of the Laws of 1925 of New York was directly before the Court of Appeals on the reargument in the first proceeding. Indeed it was the particular question for the determination of which the reargument had been allowed. The direct decision of unconstitutionality was no more a dictum than the decision that the statute was inapplicable to the certified question. Either of these determinations would

have demanded an affirmance of the judgment of the Appellate Division. Both were binding determinations in the cause.

(e) It needs no argument to reach the conclusion that, against this binding determination of the unconstitutionality of Chapter 253, petitioners could and should have sought review at any time on or after July 15, and before October 16, 1925. They may not extend the time for such a review or save the consequences of their default by instituting a second proceeding and carrying it, as they here did, through the state courts anew. If they could do this once they could do it any number of times, thereby making the three months' limitation of the federal statute wholly ineffectual. No suitor may fix his own limitation for seeking a review in this court.

THIRD.

The question here presented is not of the kind accorded a review in this court.

The Law:

Rule 35—5-a of the rules of this court outlining generally the features making for review by certiorari in this court of decisions of state courts says:

> "Where a state court has decided a *federal question* of *substance*, not theretofore determined by this court, or determined in a way properly not in accord with applicable decisions of this court."

By "question of substance" is meant "of gravity and general importance to the public."

In re Woods, 143 U. S., 202.
In re Chetwood, 165 U. S., 443.
Forsythe vs. *Hammond*, 166 U. S., 506.
Fields vs. *U. S.*, 205 U. S., 92.
U. S. vs. *Rimer*, 220 U. S., 547.
Layne, etc., Co. vs. *Western Well Works*, 261 U. S., 387.
Magnum Co. vs. *Coty*, 262 U. S., 159.
Southern Power Co. vs. *No. Carolina Public Service Co.*, 263 U. S., 508.

In the *Magnum Company* case this court said:

> "Our experience shows that 80% of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

In the *Layne* case this court said:

> "* * * it is very important that we be consistent in not granting the writ except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, etc."

Application of the Law:

(a) There is here no federal question that is available to petitioners. Petitioners have been denied no constitutional right. Their complaint is that the State of New York has refused to exercise compulsory jurisdiction over New Jersey executors. This means that it has refused to interfere with the State of New Jersey in the latter's administration of an estate of its own deceased citizen.

Had New York asserted jurisdiction over them, these New Jersey executors might have sought this court to protect their right to be subject only to the laws and court orders of the state of their appointment, and to prevent the confusion that would necessarily attend determinations and orders in New York and separately in New Jersey, with respect to the same estate and administration.

But, after New York had refused to create such confusion, should this Court compel it to do so? Is it not a question of state policy or of comity, i. e., state policy as between New York and New Jersey?

The state policy:

Both the courts and legislature of New York have declared against a policy of compulsory interference. The declarations of its courts are found in *Helme* vs. *Buckalew*, 229 N. Y., 363, in *Rogers* vs. *Gould*, 210 App. Div., 15, and in *McMaster* vs. *Gould*, 240 N. Y., 379.

The first two cases read Section 160 of the Decedent's Estate Law of New York—the only statute applicable to foreign executors—as not attempting to confer compulsory jurisdiction over them, but as merely granting them a permissive right to use the courts of New York. The last case declared the 1925 amendment of Section 160 (Chapter 253, Laws of 1925) to be unconstitutional.

The legislature of New York gave its last expression on policy by an Act (Chapter 660, Laws of 1926) approved April 30, 1926. This Act became a law only three days before the argument in the Court of Appeals on the attempted appeal as of right in this second proceeding. For convenience a copy of the Act is printed as Appendix B to this brief. It repeals Section 160 and all its amendments—thereby declaring it to be the policy of the state not to attempt through its own courts to control foreign executors. The repeal leaves

the Statute Law of New York exactly as it was in 1910 when this action was begun, for section 160 was first enacted in 1911. The State of New York has in effect said to petitioners and others.

> "You may not use our courts to settle your claims against a deceased citizen of New Jersey, whose estate is being administered in New Jersey. Rather you should go to New Jersey and pursue the remedies afforded in that state to those having demands against its deceased citizens.

Comity:

New Jersey never attempted to compel New York executors to submit to New Jersey courts and New York never offered such privilege to New Jersey. Moreover, comity is necessarily a *voluntary* expression. It is the very antithesis of unwilling and constrained conduct. Comity can never be *forced* on one government by another.

FOURTH.

The question is one theretofore determined by this Court.

From *Pennoyer* vs. *Neff*, 95 U. S., 714, 737 forward, this Court has steadily declared that a citizen of one state may not be proceeded against in the courts of another by a substituted service in actions in personam.

The courts of New York have decided that the service here attempted was a substituted service. *Hill* vs. *International Products Co.*, 232 N. Y., 592 (198 App. Div., 591). They have also decided that this very action was one in personam. *McMasters* vs. *Gould*, 240 N. Y., 379.

These determinations conclude those features. It remains but to apply the principles laid down by this Court in *Pennoyer* vs. *Neff* and sequential cases. Therefore, to consider the question here sought to be reviewed would be but to reannounce a settled rule of this Court.

CONCLUSION.

The petition for certiorari should be denied.

Respectfully submitted,

WILLIAM WALLACE, JR.,
Respondents' Counsel.

APPENDIX A.

NEW YORK SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

HENRY W. MCMASTER and FRANCIS H. SKELDING, as Receivers of The Wabash Pittsburgh Terminal Railway Company,

Appellants,

against

GEORGE J. GOULD, et al.,

Defendants,

Impleaded with Schuyler Neilson Rice and Kingdon Gould, as Executors, etc.,

Respondents.

Sirs:

YOU WILL PLEASE TAKE NOTICE that an order of which the within is a copy, was this day duly entered in the office of the Clerk of this Court, at his office in the County of New York.

Dated, New York, February 11, 1926.

Yours, etc.,

CHADBOURNE, STANCHFIELD & LEVY,
No. 120 Broadway, New York City.

GILLESPIE & O'CONNOR,
No. 20 Vesey Street, New York City,
Attorneys for Kingdon Gould and Schuyler Neilson Rice, as Executors of George J. Gould, deceased, appearing specially and solely herein for the purposes of objecting to the jurisdiction of the Court over such Executors.

To:

Messrs. Larkin & Perry,
Attorneys for Plaintiffs,
80 Broadway,
New York City

Louis Marshall, Esq.,
of Counsel for Plaintiffs,
120 Broadway,
New York City.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 11th day of February, 1926.

Present—Hon. JOHN PROCTOR CLARKE, *Presiding Justice*,
" VICTOR J. DOWLING,
" EDWARD R. FINCH,
" JOHN V. McAVOY,
" FRANCIS MARTIN, *Justices.*

HENRY W. McMASTER and FRANCIS H. SKELDING, as Receivers of the Wabash Pittsburgh Terminal Railway Co.,

Applts.,

vs.

GEORGE J. GOULD,

Deft.-Respt.,

Impleaded with James Ramsey, Myron T. Herrick and James Hazen Hyde,

Defts.

Order Denying Leave to Appeal to the Court of Appeals.

The above named Plaintiffs having moved for leave to appeal to the Court of Appeals from the order of this Court entered herein on the 29th day of January, 1926,

Now, upon reading and filing the notice of motion with proof of due service thereof, and the affidavit of Louis Marshall in support of said motion, and the affidavit in opposition thereto, and after hearing Mr. Louis Marshall for the motion, and Mr. (no one appearing in opposition thereto) opposed,

It is hereby unanimously ordered that the said motion be and the same is hereby denied, with $10 costs.

Enter,

J. P. C.

Appellate I e Division of the

SUPREM EME COURT,

First Judici licial Department.

Mc McMaster

vs.

Gou ould, et al.

ORDER DENYING NG LEAVE TO APPEAL
TO THE COU URT OF APPEALS

Filed, F , Feb. 11, 1926.

NEW YORK SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

HENRY W. McMASTER and FRANCIS H. SKELDING, as Receivers of The Wabash Pittsburgh Terminal Railway Company,

Appellants,

against

GEORGE J. GOULD, et al.,

Defendants,

Impleaded with Schuyler Neilson Rice and Kingdon Gould, as Executors, etc.,

Respondents.

ORDER DENYING LEAVE TO APPEAL TO THE COURT OF APPEALS WITH NOTICE OF ENTRY.

CHADBOURNE, STANCHFIELD & LEVY,
No. 120 Broadway, New York City.

GILLESPIE & O'CONNOR,
No. 20 Vesey Street, New York City,
Attorneys for Kingdon Gould and Schuyler Neilson Rice, as Executors of the Estate of George J. Gould, deceased, appearing specially and solely herein for the purpose of objecting to the jurisdiction of the Court over such Executors.

Copy rec'd. Feb. 20/26.
LOUIS MARSHALL,
Counsel for Plffs.

Copy received Feb. 20, 1926.
LARKIN & PERRY,
Attorneys for Plaintiffs.

APPENDIX B.

LAWS OF THE STATE OF NEW YORK

CHAPTER 660

AN ACT to repeal section one hundred and sixty of the decedent estate law, relating to suits by foreign executors and administrators.

Became a law April 29, 1926, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section one hundred and sixty of chapter eighteen of the laws of nineteen hundred and nine, entitled "An act relating to the estates of deceased persons, constituting chapter thirteen of the consolidated laws," as added by chapter nine hundred and nineteen of the laws of nineteen hundred and twenty and last amended by chapter six hundred and three of the laws of nineteen hundred and twenty-five, is hereby repealed.

§2. This act shall take effect immediately.

STATE OF NEW YORK, }
Office of the Secretary of State, } ss.:

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

FLORENCE E. S. KNAPP,
Secretary of State.

Office Supreme Court, U. S.
FILED
APR 25 1927
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1926.

No. [redacted] 85

HENRY W. McMASTER and FRANCIS H. SKELDING, as Receivers of the Wabash Pittsburgh Terminal Company,

Petitioners,

against

GEORGE J. GOULD; KINGDON GOULD and SCHUYLER NEILSON RICE, as Executors of the Estate of George J. Gould, deceased,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

RESPONDENTS' BRIEF.

WILLIAM WALLACE, JR.,
Respondents' Counsel.

Gallo & Ackerman, Inc., 6 Church St. & 107 Liberty St., Phones Rector 7257-8.

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Supreme Court of the United States

OCTOBER TERM, 1926.

No. 482.

HENRY W. MCMASTER and FRANCIS H. SKELDING, as Receivers of the Wabash Pittsburgh Terminal Railway Company,

Petitioners,

against

GEORGE J. GOULD: KINGDON GOULD and SCHUYLER NEILSON RICE, as Executors of the Estate of George J. Gould, deceased,

Respondents.

ON WRIT OF CERTIORARI GRANTED OCTOBER 18, 1926, TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Brief for Respondents Kingdon Gould and Schuyler Neilson Rice, as Executors of the Estate of George J. Gould, Deceased.

This writ brings up for review by this Court, the action of the Supreme Court of New York County and of the Court of Appeals of the State of New York, in refusing to compel the New Jersey executors of Geoge J. Gould, de-

ceased, against their will, to be substituted as parties defendant in place of their deceased testator, in an action in which at his death, he was a party defendant, and which then was and now is pending in the first named court.

The Special Term of the Supreme Court based its refusal (of November 16, 1925) on a decision of the Court of Appeals upon a prior application for substitution in the same case (Record, fol. 74, page 87), which decision is reported in 240 N. Y., 379, and is also printed in this record (fols. 67-73, pages 81 to 86, both inclusive).

On January 29, 1926, the Appellate Divison affirmed the above decision of the Special Term without an opinion (Record, fols. 76-77, page 88).

On May 15, 1926, likewise without opinon (Record, fols. a and b, pages 1 and 2), the Court of Appeals dismissed an appeal taken by these petitioners on February 23, 1926 (Record, fols. 80-81, pages 89-90). This was done after the Appellate Division, on February 11, 1926, had denied their application for leave to appeal (Record, fols. 78-79, page 89). Those decisions are reported in 215 App. Div. (N. Y.), 811, and in 152 N. E., 446.

The lack of opinions in the Appellate Division and in the Court of Appeals, upon the second application, may be explained by the fact that such second application was based solely on a statute of New York (Chap. 253, Laws of 1925, enacted April 1, 1925), which was likewise on April 14, 1925, made the basis of a motion by petitioners in the Court of Appeals in proceedings under the first application for leave to reargue (against its decision rendered January 21, 1926), upon the declared ground that Chapter 253 entitled "the appellants herein to a reversal of the order of the Appellate Division," etc. (Record, fol. 61, pages 77, 78).

The rather involved proceedings in these two interlocking attempts to compel respondents to litigate in New

York may be more readily understood by reference to a "chronology" of the first proceeding found in the present record (fols. 59, 60, pages 76, 77), which "covers every step" (including those taken after April 1, 1925, when Chapter 253 was enacted) down to the final decision of July 15, 1925, upon the reargument (240 N. Y., 379).*

The record also shows (fols. 58, 59 pages 75, 76) that the orders to show cause and the supporting affidavits were practically identical in these two proceedings for substitution.

Supplemental Statement for Respondents.

This action was begun in the Supreme Court of New York in September, 1910 (Record, fol. 32a, page 22) to compel an accounting by the five defendants, of whom George J. Gould was one, for moneys handled by them (as syndicate managers) for the Pittsburgh-Terminal Railway Company, a corporation organized pursuant to the so-called "Pittsburgh-Toledo Syndicate" agreement. That syndicate had been organized to bring the Wabash Railroad into Pittsburgh. A money judgment was sought for whatever might be found due (Record, fol. 321, pages 29, 30).

One of the five defendants never had been served. Two others had died pending the suit. This left Gould and Myron T. Herrick as the only defendants before the court, on May 16, 1923, when Gould died. At that time he was, and for over twenty years before, had been a citizen of New Jersey (Record, fol. 36, page 69).

On June 4, 1923, Gould's will was admitted to probate in the Orphans Court of Ocean county (his home coun-

*The Appellate Division adopted as its opinion in the first proceeding (210 App. Div., 806) its own opinion in a like proceeding in the case of Rogers, et al., vs. Gould, et al. (210 App. Div., 15).

ty), New Jersey. These respondents, who were named as executors in his will, duly qualified and received from said court, letters testamentary under the will (Record, fols. 36, 37, page 61).

Since then the estate of George J. Gould has been in due course of administration, in and under the control of the proper court of New Jersey; and these respondents have been discharging their executorial duties under such appointment and letters, in connection with that administration and not otherwise.

Respondents refused to appear in this New York action. On December 24, 1923, and in the first proceeding therefor, petitioners secured an order requiring respondents to show cause why they should not be substituted therein, which order provided for substituted service. After such service respondents appeared solely and specially to challenge the jurisdiction. On February 23, 1924, the lower court granted an order of substitution against them.

On their appeal, and on July 2, 1924, the Appellate Division reversed that order (210 App. Div., 806). Petitioners appealed and on January 21, 1925, the Court of Appeals affirmed the Appellate Division (Rec., fol. 60, page 77).

At all times here pertinent and until its repeal in April, 1926, Sec. 160 of the Decedent Estate Law was the only statute of New York that expressly referred to foreign executors or administrators. It is held in New York that statutes referring generally to executors and administrators deal only with domestic officials. Such also is the rule in other jurisdictions. So, apart from Sec. 160, the rule of the common law obtained. This will be developed and applied in the argument.

On July 15, 1925, and after reargument, the Court of Appeals finally affirmed the Appellate Division (240 N. Y., 379). Thereupon on November 19, 1925, peti-

tioner began a *second* proceeding in the Supreme Court which led to the decision here under review.

Section 160 had been interpreted by the highest court of New York—in *Helme* vs. *Buckalew*, 229 N. Y., 363, as not attempting to compel foreign executors or administrators to submit, against their will, to the jurisdiction of the courts of the state of New York; and as merely granting a privilege to such foreign executors to use the courts of New York, if they should so desire. See also *Rogers* vs. *Gould*, 210 App. Div., 15.

This court will accept that reading of Section 160 as conclusive. Wherefore, petitioners may not urge any right under the old section. Moreover in this second proceeding they base their alleged right to have substitution solely on the new matter in Chapter 253 above.

In its opinion of July 15, 1925, the Court of Appeals, speaking of the amendment, ruled that, neither as to foreign executors any more than foreign administrators, may the Legislature compel a submission to the jurisdiction of the local courts in an action *in personam*. With respect thereto that Court (240 N. Y., 379, at 386), said:

> "We must now extend our decision to cover the point. The intimation of the court is clear. The executor as individual and as an official is in the theory of law two persons. Even as to foreign executors, there must be a domicile or possession which gives to the *res* to be administered a situs in New York. This conclusion seems inevitable. * * * *But the purpose of the New York Statute* (Laws 1925, Ch. 253) *is to permit the revival of suit against the foreign representative for a judgment in personam without restriction or qualification.* It does not discriminate between a case where there are assets and a case where there are no assets; between an attempt to reach assets and an attempt to get a general

judgment in personam * * *. The concept of a foreign non-resident executor without assets in this State as present in his fiduciary capacity is as difficult as the discarded concept of a foreign corporation as present in this State merely because one of its directors is found here" * * * (Rec., fols. 63, 64 pages 79, 80).

Thus the Court reads the new matter in Chapter 253 as being an attempt to compel submission in all actions whether *in rem* or *in personam*. It further reads it as being inseparable in that regard. Thereof the Court said:

"The statute draws no distinction between executors and administrators. If it were wholly good as to executors, we might infer that the Legislature desired to go as far as possible in bringing into the jurisdiction the foreign representatives of decedents' estates and hold it valid in part. On the other hand, we might infer that the legislative intent was to put executors and administrators on the same footing and then we should treat the statute as a whole in determining its validity. The trouble is that, in permitting the revival of all pending actions by bringing in foreign executors of deceased defendants, if the cause of action survives, it goes much too far to enable us to separate the good from the bad, whether we adopt one figment or the other" (Pollock vs. Farmers' L. & T. Co., 157 U. S., 429).

Because of the foregoing interpretation of Chapter 253 this Court will not view it as applicable only to actions *in rem*, or as separable so as to ignore the attempt of the Legislature to reach actions *in personam*. As a result the matter for review here would seem to be narrowed to a single question, viz:

May there be compulsory jurisdiction over foreign executors in actions *in personam* as well as *in rem?*

Such would be the limitation if the petitioners were held strictly to the basis upon which they assert a right of review. However, because of an inherent power of a court to conclusively dispose of the *res* and to that end to summon anyone in a proceeding *in rem,* it may be that this Court will consider the further question as to whether this particular action was one *in rem* or *in personam.*

In conclusion it should be noted that on April 29, 1926, the Legislature of New York (by Chapter 660 of the Laws of 1926), repealed Section 160 of the Decedent Estate Law as it then stood. This repealing statute reads as follows:

"LAWS OF THE STATE OF NEW YORK
CHAPTER 660

AN ACT to repeal section one hundred and sixty of the decendent estate law, relating to suits by foreign executors and administrators.

Became a law April 29, 1926, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section one hundred and sixty of chapter eighteen of the laws of nineteen hundred and nine, entitled 'An act relating to the estates of deceased persons, constituting chapter thirteen of the consolidated laws,' as added by chapter nine hundred and nineteen of the laws of nineteen hundred and twenty and last amended by chapter six hundred and three of the laws of nineteen hundred and twenty-five, is hereby repealed.

§2. This act shall take effect immediately."

This repeal has left New York without any statute law expressly regulating the use of its courts by or against foreign executors or administrators.

ARGUMENT.

The alleged constitutional right for the vindication of which petitioner seeks this Court is a claim of right to revive against, and to substitute, foreign executors in an action pending against their testator and others at his death. We have no concern with *scire facias* to revive a judgment against a *living* judgment-debtor, or with proceedings to revive a pending suit against a *domestic* executor.

Certain fundamental principles should be borne in mind during this discussion. These are

1. Respondents are foreign executors, regardless of their personal residence.

> *Hopper* vs. *Hopper*, 125 N. Y., 400, 402, 403.
> *Hill* vs. *International Products Co.*, 198 A. D. (N. Y.), 591, 593; affirmed 232 N. Y., 592.
> *Rogers* vs. *Gould*, 210 A. D. (N. Y.), 15.

2. A service on foreign executors, wherever or however made (and even though made in New York), would not of itself confer jurisdiction upon the courts of this state over them. It would be but a substituted service within the rule of *Scott* vs. *McNeal*, 154 U. S., 34, 46.

In the Hill case (supra), the Guaranty Trust Company, a New York corporation, with principal place of business in New York City, was appointed in Vermont as executor of Theodore N. Vail, former president of the Western Union Telegraph Company. It was served with summons in its New York office. The Court ruled that

in its executorial character, the company was not in New York for service or otherwise.

3. A substituted service will not support a judgment *in personam*, as distinguished from one *in rem*.

Pennoyer vs. *Neff*, 95 U. S., 714.
Scott vs. *McNeal*, supra.
1 Corpus Juris, Sec. 480, page 230 and cases.

4. The mere presence of assets of Gould in New York would not make this action—if otherwise *in personam*—an action *in rem*. This feature was present in the Hill case. Of it the Court said:

> "The purpose of the action is not to compel an administration of these assets here, nor to impress a trust or an equitable lien upon them. It is, therefore, not an action *in rem* or affecting the *res*, as was *Holmes* vs. *Camp*, 219 N. Y., 359. The action has nothing to do with the estate or its administration. It is solely to establish, so far as this defendant is concerned, the liability of Theodore N. Vail's executor for the acts of the testator."

5. In the absence of a permissive statute, a foreign executor may neither sue nor be sued, nor defend in the courts of other than the state of his appointment.

In *Sloan* vs. *Sloan*, 21 Fla., 589, 595, the Court said:

> "Neither the common law, the law of nations, nor the statutes of this state, permit a suit to be maintained in our courts against an executor or administrator, who has obtained his letters testamentary or of administration from the courts of another state."

Lyon vs. *Park*, 111 N. Y., 350, 355, was decided before there was any permissive statute. Speaking of a motion to revive and continue, the Court said:

"There can be no doubt that the motion was properly dismissed as to the representatives of the defendant Baxter. The remedy against a foreign administrator, in his representative character, to charge the assets of his intestate for a debt or liability of the decedent, is governed by the law of the jurisdiction where he was appointed, and must be pursued in the legal tribunals of the state or county where the decedent resided at the time of his death and where administration was granted (Story's Con. of Laws, Sec. 513; Schouler on Exrs., Sec. 173; Peterson vs. Chemical Bank, 32 N. Y., 21; Hedenburg vs. Hedenburg, 46 Conn., 30). Whatever qualifications to this rule may exist, they proceed upon special reasons and are not material to the present controversy."

The qualifications referred to are as to actions or proceedings *in rem*, where the force of the judgment is exhausted on the res within the jurisdiction.

See also:

Matter of Webb, 11 Hun (N. Y.), 124.
McGrath vs. *Weiler*, 98 A. D., 291, 292, 293.

In the latter case the court quoted from *Matter of Webb* as follows:

"The chancellor in deciding the case (Doolittle case) held that it was well settled that a party cannot sue or defend in our courts as executors or administrators under the authority of a foreign court of probate. * * * It was again repeated * * * and to the same extent in *Vaughan* vs. *Northrup* (15 Peters, 1); *Noonan* vs. *Bradley* (9 Wall., 394); 2 Williams on Executors (3rd Am. Ed., 1641), Story's Con. of Laws

(5th Ed.), Sec. 513. The authorities all appear to be in one direction, holding the law to be that foreign executors and administrators cannot merely by virtue of their offices, either prosecute or defend actions in the courts of other states. In some instances the disability has been removed by statute, but where that is not the case and the representative has not removed the assets or some portion of them into this state, the rule of the common law is that which has been already stated."

The Court (in the McGrath case) then added:

"The disability of the common law has not been removed by any statute to which our attention has been called."

This Court has recognized the rule announced by the Court of Appeals of New York in *Lyon* vs. *Park*, supra, i. e., that foreign executors are responsible only to the courts of the state issuing letters to them, in *Railroad Company* vs. *Gomilla*, 132 U. S., 478; *Case of Broderick's Will*, 21 Wall. (U. S.), 503, 519, and *Goodrich* vs. *Ferris*, 214 U. S., 71.

I.

THE STATUTES OF NEW YORK.

Section 160, Decedent's Estate Law.

What is now Section 160 of the Decedent's Estate Law was enacted in 1911, and continued unchanged until the amendment of 1925. As it stood before that amendment it was construed by the Court of Appeals (*Helme* vs. *Buckelew*, 229 N. Y., 363) as permissive only, i. e., as removing the disability of the common law and extending

the privileges of the New York courts to such foreign executors, as might wish to avail themselves thereof, for purposes of suit or defense. There was no attempt in this statute, as read by the Court of Appeals, to vest any power of coercion over unwilling foreign executors.

The 1925 Amendment.

The situation remained unchanged until the amendment of 1925. The new matter then adopted was read by the same court, as an attempt to coerce foreign executors in actions *in personam,* as well as in actions *in rem,* and the statute was declared to be indivisible.

McMaster vs. *Gould,* 240 N. Y., 379.

This Court will read the amendatory act as read by the Court of Appeals of New York. Therefore, unless (a) this suit is one *in rem,* or unless (b) foreign executors may be coerced into the New York jurisdiction against their will in actions *in personam,* plaintiff has gained no right to substitution, by the amendment of 1925.

AS PENDING AGAINST GOULD WHEN HE DIED, THIS ACTION WAS [redacted]T ONE *IN PERSONAM.*

1. The distinction between actions *in personam* and *in rem* is aptly declared in 1 Ruling Case Law, Section 13, page 328, as follows:

> "An action *in personam* has for its object a judgment against the person as distinguished from a judgment against property to determine its status * * *. In a strict sense a proceeding *in rem* is one taken directly against property * * *. But * * * in a larger and more general sense the terms are ap-

plied to actions between parties where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, actions to enforce liens, to foreclose mortgages and to partition real estate."

2. In line with the above the following cases quoted approvingly in *Helme* vs. *Buckalow*, 229 N. Y., 363, indicate that an action for a money judgment on account of an alleged mismanagement of trust funds, is not an action *in rem.*

Thorburn vs. *Gates*, 225 Fed., 613;
Matter of Foster, 7 Hun (N. Y.), 129;
Hill vs. *International Prod. Co.*, 198 App. Div., 591 (affirmed in 232 N. Y., 592);
Stromeyer vs. *Aldrich*, 227 Fed., 960;
Lewis vs. *Parrish*, 115 Fed., 285.

In *Matter of Foster*, 7 Hun (N. Y. Sup. Ct.), 129, 130, the Court said:

"The direct object of the proceeding was to establish a personal liability against Hoguet growing out of the alleged mismanagement of a trust," etc.

In *King* vs. *Chase*, 159 Cal., 420 (115 Pac., 207), in an action in equity by a subsequent administrator of an estate against the executor of a deceased executor of that estate for an accounting, the Court distinguished the jurisdiction in equity from that in probate thus (210):

"* * * it can hardly be said that this action, binding only the parties to it, is the equivalent of the probate proceeding for the settlement of an account. That is a proceeding *in rem*, after notice to all persons interested."

In *Evans* vs. *Evans,* 76 So., 95 (an action in equity to enforce a trust as to a specific fund distributed by probate decree), the Court said:

> "The question for decision in this case does not fall within the class of proceedings in rem."

3. Had this action been concluded adversely to George J. Gould in his lifetime the judgment would have been against him personally for a sum of money only. No specific property would have been subject to any lien for the satisfaction of that judgment. Nor would any specific property have been disposed of by such judgment or made available thereunder. No status would have been declared as to any specific property. On the assumption last made the judgment would have been in no wise different from a judgment on a note or open account or for damages *ex delicto.*

4. So again, if at Gould's death he had been domiciled in New York and his domestic executor had been substituted—as, of course, might have been done—the judgment, if adverse would have been a personal judgment against such executor.

In Stacy vs. Thrasher, 6 How. (U. S.), 44, 60, this Court said:

> "This argument assumes that the judgment is *in rem,* not *in personam;* or that the estate has a sort of corporate entity and unity. But this is not true either in fact or in legal construction. The judgment is against the person of the administrator, that he shall pay the debt of the intestate out of the funds committed to his care."

See also

Johnson vs. *Powers*, 139 U. S., 156, 161.

In Thorburn vs. Gates, 103 Misc. (N. Y.), 292 (affirmed in 184 App. Div. [N. Y.], 443), the Court said:

> "An action against a foreign executor as such (like an action against a domestic executor) is an action *in personam.*"

5. If in the case supposed in subdivision 2 above, the death of George J. Gould had occurred after rendition of judgment but before its collection, the power to enforce payment by execution would have ceased.

In *Matter of Steencken*, 51 App. Div. (N. Y.), 417, 418, the Court said:

> "* * * although the surrogate by the death of Steencken lost any power to make a decree which would charge Steencken personally * * *. A decree may still be made to distribute the property which is in the hands of Bolte as executor, or that may have come into his hands as surviving executor * * * although not to charge Steencken personally with any liability," etc.

In such a case the judgment would have to be presented, as a claim against the estate, to the estate representative in the primary jurisdiction, to share with other claims of the same class, in the estate assets available for payment in due course of administration.

In *Railroad Company* vs. *Gomila*, 132 U. S., 478, 485, this Court said:

> "We do not recall any case now where the Federal Courts have not paid respect to the principal that all debts to be paid out of the Decedent's Estate, are to be established in the court to which the law of his domicile has confided the general administration of his estate."

In *Goodrich* vs. *Ferris*, 214 U. S., 71, this Court referred to it as a "subject peculiarly within state control."

The power to control the administration of the estates of its deceased citizens is a sovereign power essential to protect a state's own tax claims, the claims of its citizen creditors and to insure proper devolution of property within its borders. It existed before the birth of Gould or of those who sued him. It could not be limited by individual action, by suit or otherwise.

For a like reason a state (other than that of the domicile of the deceased), has the power to administer assets of a citizen of a foreign state within its own borders, but such a power exhausts itself on the assets within the jurisdiction.

We are suspicious of any contention which depends for its integrity on the assumption that a court may keep a dead person alive until a judgment can be rendered in a personal action pending against him at his death. In *Helme* vs. *Buckelew*, the Court, speaking of actions *in personam* against foreign representatives, said (page 371):

> "If such actions are authorized, I do not know how we are to enforce the judgments. Surely the plaintiff is not expected to sell the property upon execution, and appropriate it to the use of himself and no one else. That would conflict with the scheme of the statute regulating suits against ancillary executors and administrators (Code Civ. Pro., Sec. 2635), and with the whole theory and framework of legislation in respect of the distribution of estates."

The author in 23 Corpus Juris, 997 in defining "Administration," says:

> "It involves all that may be done rightfully in the preservation of the assets and all which may be done legally by the administrator in his dealings with creditors, distributees or legatees, or which may be done by them in securing their rights."

Petitioners' case is not helped by the Act of 1925. Even if it were still in force, its infirmities are too glaring. To avoid them (on pages 14 and 15 of their brief), petitioners seek to have ths Court read the Act of 1925 as separable. Herein they simply ignore the fact that the Court of Appeals of New York has read the Act as inseparable.

The three cases cited by them on this feature might well be cited against them. In the *Berea College* case, 211 U. S., 45, the state court had held the state statute separable and valid in part. The Court, as it always does, adopted that interpretation by the state court. A like situation obtained in the *Carey* (Migratory Bird Law) case, 250 U. S., 118, 121.

In the *Weller* case (268 U. S., 319), this Court again accepted the view of the state (New York) Court of Appeals that the theater ticket statute was separable and could be upheld in part. These cases will hardly support a request that this Court hold separable an Act which the Court of Appeals of New York has read as inseparable.

Petitioners also present this feature as if the only question was one of difference between the official status of an administrator and an executor. They ignore the other feature that the Act failed to distinguish between actions *in rem* and those *in personam*.

The Act of 1926.

By the repeal in April, 1926, of Section 160, Decedent's Estate Law, the only statute expressly referring to foreign executors disappeared; and the situation became as it was when the *Lyons* case and the *Webb* and *McGrath* cases were decided.

In Point (7), page 28, of petitioners' brief, it is urged that the Act of 1926, because subsequent to the commencement of this action, cannot affect it.

Here we may quote petitioners against themselves. For with respect to the 1925 Act—their interest being otherwise—when applying for reargument in the Court of Appeals because of the passage of that Act, they said in an affidavit accompanying their petition to that Court (page 28):

> "Section 160 of the Decedent's Estate Law as now amended is a statute in regulation of procedure, and even though adopted after the taking of the appeal to this court, controls and is to receive a retrospective interpretation" (citing cases from the Court of Appeals and other courts of New York).

In their brief on the same motion, they further said:

> "Even if enacted after the appeal had been taken to this court, being procedural, the statute controls the determination of the questions as to the survival of the action and the right to substitute Gould's executors and is to receive a retrospective interpretation."

In this connection, they also cited a further case from the Court of Appeals of New York (*Robinson* vs. *Robins Dry Dock & Repair Co.*, 238 N. Y., 271) and two others from Massachusetts.

Comity.

Since the repeal of 1926 the New York courts are no longer open, even permissively, to New Jersey executors.

New Jersey has never assumed to coerce New York executors to the processes of her courts. In *Newark Savings Institution* vs. *Jones,* 35 N. J. Eq., 406, New York executors appeared and demurred without preserving in advance their jurisdictional objection. This put them in the New Jersey court voluntarily for all purposes.

Even if New Jersey had seized on New York executors this would not justify New York in doing so against objection. Nor can the fact that executors thus drafted in New Jersey choose to submit rather than to carry the question to this court affect the New York court's power to act when that power is challenged. One wrong would not justify another.

Comity is something very different. If it were possible in cases of compulsion, because of reciprocal legislation between the two states, there is nothing of the kind either in New York or New Jersey. The New York courts have interpreted Section 160 as granting a privilege only and have judicially refused compulsion. New Jersey has no statute dealing with other than a privilege.

We may not spell out of this situation any purpose or policy on the part of either state to permit the other to settle for it, questions affecting the estates of deceased citizens of the former.

Thus far, though we have referred occasionally to cases in which the element of revivor was present, we have been considering the matter largely from the standpoint of *original* actions by or against foreign executors. We now take up the question of revivor and substitution.

THE INHIBITION APPLIES AS MUCH TO SUBSTITUTION IN ACTIONS PENDING AT DEATH AS IN ACTIONS BEGUN AFTER THE DEATH OF THE TESTATOR.

1. Petitioners urge that Section 82 of the Civil Practice Act of New York, which provides that

> "An action does not abate by any event if the cause of action survives and continues,"

warrants and demands continuance of the action against anyone and *everyone*. Such is not the law.

In 24 *Corpus Juris*, Section 2720, page 1136, the author says:

> "The general rule is that an executor or administrator appointed in one jurisdiction cannot be sued in his representative capacity in any other jurisdiction; *nor can an action pending against decedent at the time of his death be revived against a foreign* representative of his estate."

In *Conley* vs. *Huntoon*, 37 R. I., 343 (92 Atl., 865, 866), speaking of the revivor of suits pending at death, the Court said:

> "Such proceedings, if the same had been prescribed, would in most instances amount to an attempt to control the application of assets out of the jurisdiction of the courts of this state and would be an unfriendly interference with the settlement of estates of other jurisdictions."

In *Stromeyer* vs. *Aldrich*, 227 Fed., 960, speaking of an effort to substitute foreign executors in an action pending against their testator at his death, the Court said:

"If the executors had received letters from a Surrogate of New York, they could be brought in as parties irrespective of any question of their citizenship (citing cases). If the court, however has no jurisdiction of the executors because they are not qualified to sue or be sued here, there can be no revivor."

2. We concede that the cause of action did not absolutely perish at the death of George J. Gould. It was but suspended until some one could be found against whom the action might be continued. A New York executor, if one had been appointed, would have been such a person; a foreign executor is not.

Statutes sequential to Sec. 82 above are Secs. 121 and 757 of the Code of Civil Procedure (New York). Both deal with revivor and substitution; the former in the case of the death of *a* party, the latter in the case of the death of the *sole* party plaintiff or defendant. Each declares that, *if the cause of action survives,* the court "may" (in the first case) and "must allow or compel" (in the second case) "the action to be continued by or against his representative or successor in interest."

McGrath vs. *Weiller,* 98 App. Div. (N. Y.), 291, was an action at law to recover a money judgment. The defendant died at his home in Pennsylvania, where his will was probated and letters testamentary issued. The Appellate Division reversed an order of the Supreme Court reviving the case against, and substituting the Pennsylvania executor.

Speaking of the above statutes, the court said:

"The codifications are identical in substance and *must be held to relate to representatives and successors over whom jurisdiction exists in the actions and which do not include foreign representatives in actions at law.* The rule invoked in the *Webb* case

seems to have been uniformly followed both before and since the enactment of the Code of Civil Procedure (see *Field* vs. *Gibson*, 56 How. Pr., 232; *Murphy* vs. *Hall*, 38 Hun, 528; *Ferguson* vs. *Harrison*, 27 Misc. Rep., 380; *Flandrow* vs. *Hammond*, 13 App. Div., 325; *Montgomery* vs. *Boyd*, 78 id., 64, 72; *Slade* vs. *Hale*, 84 id., 633; *Lyon* vs. *Park*, 111 N. Y., 350; *Johnson* vs. *Wallis*, 112 id., 230; *Hopper* vs. *Hopper*, 125 id., 400)."

The above rule as to the effect of statutes referring generally to executors and administrators rather than specially to *foreign* executors and administrators, prevails elsewhere also.

In *Conley* vs. *Huntoon*, 37 R. I., 343, 92 Atl., 865, the court said:

"We are constrained to hold that a statute, when it names an official, must be construed to refer to one appointed by the same sovereignty which enacts and enforces the statute, unless such construction manifestly violates the context."

In *Matter of Webb* (11 Hun [N. Y], 124), the court reversed an order reviving the action against New Jersey executors and said at page 125:

"But the cause of action alleged arose during the lifetime of the testator, and the trusts created by his will have no possible relation to or connection with it. For those reasons the action cannot properly be revived and prosecuted against his executors as trustees under the will.

Neither have the executors, or either of them, removed or brought any portion of the assets in their hands into this state. If that had been done, the action might have been revived and proceeded against the party served for that reason (cases).

> The application to make them parties to the action must, therefore, depend alone upon the fact that they have been appointed executors under and by virtue of the laws of the State of New Jersey; and that, according to the uniform course of the authorities upon the subject, seems to be insufficient to justify the proceeding."

Had there been any assets of Gould in the State of New York open to administration there, petitioners could and *would* have applied for ancillary letters in New York, and brought the domestic official before the court in order to reach those assets. In the absence of any such assets a judgment in New York would be useless and legally impossible.

3. It would seem beyond argument that, if these New Jersey executors could be subjected to the jurisdiction of the New York courts in a *personal* action, any judgment rendered in such action must fix an absolute liability which the New Jersey courts could not review. Thus the judgment would become a self-proving claim against New Jersey assets. Otherwise it would be idle to prosecute this action against them or force the foreign executors to defend.

Such a result would impair the sovereign power of New Jersey to determine, through its proper courts, the validity of claims against estates of its deceased citizens. It would qualify that power so that, wherever any sort of action was pending in another state at his death, against a deceased citizen of a given state, such other state could render a binding judgment which the state of primary administration must recognize, and which must be paid, even if it exhausted all the assets of the estate. The process would be reciprocal, so that New Jersey could work out the same result agains New York

—in short, any state against any other state in the United States.

The inevitable consequences would be that the sovereign power of the state to administer and distribute the property (within its borders) of its deceased citizens would be qualified so that there would be transferred to any other state the right to conclude to judgment even merely *personal actions* pending in the courts of such other state against such citizen at his death. To that extent the power of administration would belong to the foreign state, whereas the true rule is that foreign executors are responsible only to the courts of the state issuing letters to them.

This governmental power may not be impaired, even by an owner as to his own property. So it is that gifts *causa mortis* are unavailing against an inheritance tax. The power of the state is not at the mercy of an owner; much less is it at the mercy of a hostile suitor. Otherwise the state's control would be but a shadowy thing. The state has this power to control quite apart from the owner and quite apart from his creditors.

The distinction is stressed by the author in 1 Corpus Juris, 230, Section 480, as follows:

> "In the absence of a permissive statute, the general rule is that an action cannot be revived or continued against an executor or administrator appointed in another state. But it has been held that, on the death of a non-resident defendant in an action *in rem* by attachment, the action may be continued against his foreign personal representative and as his representative or successor or successor in interest, on proper service by publication."

The author cited the Lyon case, the Flandrow case (13 App. Div. [N. Y], 325), the Strohmeyer case. See also the Thorburn cases in the Federal Court, 225 Fed., 613, 230 Fed., 922.

4. The burden of bringing this case within the exception was on petitioners. *Osterling* vs. *Fink*, 116 Misc. (N. Y.), 166.

Analysis of Cases Cited by Petitioners.

We submit the following analysis and criticism of the application made by petitioners, of the cases chiefly relied on by them.

Petitioners, in their brief, Point I, subsection (1), page 8, state an obvious and undisputed principle.

In subsection (2) page 9, the case of *McKnight* vs. *Craig*, 6 Cranch, 186, while correctly quoted, merely dealt with the procedural problem as to what facts the administrator could plead. The question as to the substitution of even a *domestic* administrator was not litigated.

Clarke vs. *Mathewson*, 12 Pet., 164, is cited under the same subsection. The statement of facts is copied verbatim from the headnote, except that petitioner fails to point out that the administrator was appointed under the *laws of Rhode Island*, which fact would give the Rhode Island court jurisdiction in a case of this nature. It is an excellent case for respondent, since it hold that, even though the administrator and the defendants were citizens of Rhode Island, the fact that the decedent was a non-resident created a diversity of citizenship sufficient to give jurisdiction to the Federal courts.

6. Under subsection (3), page 11, et seq., two cases chiefly relied on by petitioners involve *living* defendants. In the first (*Nations* vs. *Johnson*, 24 How., U. S., 195), an appeal had been taken from a judgment favorable to a non-resident defendant originally before the court, but who had left the jurisdiction after judgment and before the appeal. Being *alive* though absent, the court held that he could be noticed into court for the purpose of reviewing the judgment which he had secured. Plainly

no such result would have been possible had the defendant died before the rendition of the original judgment.

In the other case (*Michigan Trust Company* vs. *Ferry*, 228 U. S., 346), the defendant, a sole executor, was *living* (though insane) during the progress of Michigan accountings sought by a Michigan administrator *de bonis non* in a Michigan probate court. The Utah guardians of the insane executor, under direction of the Utah court in which the guardian proceedings were pending, appeared generally in and defended the Michigan proceedings through a guardian ad litem. The expenses of such defense were allowed in the Utah guardian proceedings, and paid from the guardianship estate. Thereafter suit was brought in Utah on the Michigan decree. To put the case at bar in parallel with the Ferry case, George J. Gould should now be alive, abroad and insane; an action for an estate accounting the Surrogates' Court of New York County should have progressed to final decree, after a general appearance and defense in Gould's behalf; and the present action should be an attempt to enforce that decree out of assets of George J. Gould in New Jersey, while Gould was still alive.

This case of *Michigan Trust Company* vs *Ferry* is distinguished in *N. Y. Life Ins. Co.* vs. *Dunlevy*, 241 U. S., 518, 521, 522, in which certain language of the former case was sought to be applied to an interpleader initiated by the company. In the latter case the Court said:

> "But the interpleader initiated by the company was an altogether different matter. This was an attempt to bring about *a final and conclusive adjudication of her personal rights*, not merely to discover property and apply it to debts. And unless in contemplation of law she was before the court and required to respond to that issue, its orders and judgments in respect thereto were not binding on her. *Pennoyer* vs *Neff*, 95 U. S., 714" (and other cases).

After quoting from the Ferry case, the Court in the Dunlevy case continues:

> "Of course, the language quoted had reference to the existing circumstances and must be construed accordingly. The judgment under consideration was fairly within the reasonable anticipation of the executor when he submitted himself to the Probate Court. But a wholly different and intolerable condition would result from acceptance of the theory that after final judgment a defendant remains in court and subject to whatsoever orders may be entered under title of the cause. * * * The established general rule is that any personal judgment which a state court may render against one who did not voluntarily submit to its jurisdiction, and who is not a citizen of the State, nor served with process within its borders, no matter what the mode of service, is void, because the court had no jurisdiction over his person. *Pennoyer* vs. *Neff*, supra; Freeman on Judgments, 4th ed., Sec. 120a; Black on Judgments, 2d ed., Secs. 904 and 905."

Neither of the two cases last mentioned have anything to do with the substitution of parties over whom the court had not obtained jurisdiction originally.

The so-called "Thorburn cases" are referred to by respondents. There relief was sought in each, the state and federal courts of New York. The proceedings in the state courts are reported in 103 Misc., 292; 184 App. Div., 443; 191 App. Div., 506; 193 App. Div., 174, and 232 N. Y., 544; those in the federal court in 225 Fed., 613 and 230 Fed., 922. Rightly understood, these cases are illuminating.

In the first Federal case the action was *at law* against a Texas executrix of each John W. and Charles G. Gates. She was personally served with summons within the

State of New York. Her motion to quash this service was granted.

The second Federal case was against the same defendant in like capacities and against three other defendants, but otherwise was like the first case. The ruling was similar save for a conditional order permitting further consideration of a feature stressed by counsel, but deemed of no importance by the Court and later abandoned.

The reasoning of Judge Hand in these two cases is like that of Judge Cardozo in *Helme* vs. *Buckelew*, 229 N. Y., 363. Indeed, Judge Cardozo quotes approvingly from the opinion of Judge Hand. Section 1836a, Code of Civil Procedure of New York (the counterpart of Section 160, Decedent's Estates Law) was considered in all the courts.

The action in the state court was in equity to sequester and administer specific assets. The lower court (103 Misc. [N. Y.], 292, 293), characterized the suit as

> "one in equity brought by the plaintiff, who alleges that he is a creditor of the estate of said John W. Gates, deceased, 'on behalf of himself and all of the creditors of said estate,' to reach certain real and personal property of said decedent alleged to be situated in this state and to be in possession of the defendant, and to have that property applied pro rata to the payment of the indebtedness due by said decedent and for general relief."

In this action the same foreign executrix was also personally served in New York. Ruling that it was an action *in rem*, and distinguishable from an ordinary action by a creditor to recover a debt due from the decedent, the Supreme Court held for jurisdiction. On appeal the Appellate Division adopted the opinion of the trial court.

The executrix died before answering in the cause. The

First National Bank of Port Arthur, Texas, as succeeding administrator with the will annexed of each John W. and Charles G. Gates, acting under appointment of a Texas court, was ordered substituted in place of the original deceased executrix and the action was revived against such administrator. Affirming this judgment, the Appellate Division (191 App. Div., 506-507) said:

> "The action was by a resident creditor to have administered the real and personal property of the testator's (John W. Gates) estate situate within this state, and to have the same applied in satisfaction of his debt. The court had jurisdiction of the subject-matter of the action and of the person of the foreign executrix (Thorburn vs. Gates, 184 App. Div., 443; Cf. Helme vs. Buckelew, 191 id., 59).*

On December 6, 1921, the Court of Appeals in a short memorandum opinion (232 N. Y., 544) affirmed the order which was the subject of the April, 1920, decision. That opinion reads as follows:

> "The Supreme Court obtained jurisdiction of the executrix in respect to the matters here involved by personal service of a summons upon her. It also had jurisdiction of the subject of the action, *if the object thereof were the administration of property within the state of New York for the benefit of local creditors.*

*This decision was rendered in April, 1920. The Helme decision therein referred to is its own previous decision in March, 1920. That Helme decision was reversed by the Court of Appeals on July 7 following. A motion for re-argument of the April decision was denied by the Appellate Division (193 App. Div., 174) under date of July 9, 1920, two days after the reversing decision of the Court of Appeals in the Helme case. As each opinion must have been previously prepared, it is doubtless true that the decision of the Court of Appeals in the Helme case had not been called to the attention of the Appellate Division when their opinion of July 9 in the Thorburn case was handed down.

> The court had jurisdiction of the administrator with the will annexed, and the procedure adopted for bringing in such administrator was proper. The judgment, if one be recovered by the plaintiff, will bind the foreign administrator *only to the extent of its interest in the res* in the state of New York, which is the subject of the action. *For that purpose* the administrator was properly substituted in the place of the executrix."

All the state courts stressed the jurisdiction over the subject-matter, and over the person of the executrix. The former was found to exist because the proceeding was *in rem;* the latter because of the personal service in New York. The last of the State decisions in the Thorburn case preceded by over a month the decision of the Court of Appeals in *Hill* vs. *International Products Company* (decided January 17, 1922), in which that court held that service within the jurisdiction was of no more force to confer jurisdiction than service without. The following are the distinctions between the Thorburn case and the case at bar:

1. The original action in the Thorburn case was against the executrix in her representative capacity. Of that phase in denying re-argument (193 App. Div., 174, 5, 6), the Court said:

> "An action brought against a person in his representative capacity does not abate by his death, resignation, discharge or removal. * * * An entirely different situation is presented where a defendant sued as an individual dies. His foreign executor or administrator can only be brought before the court by service of original process (Brown vs. Fletcher's Estate, 210 U. S., 82, 93; German-American Coffee Co. vs. Johnson, No. 1, 168 App. Div., 31). In such a

case, the foreign executor or administrator could appear specially for the purpose of contesting the jurisdiction of the court. But in this case the court had jurisdiction of the subject-matter, which was the assets of the estate in this state, and of the person of the representatives of the estate."

2. The Thorburn case was an action in equity to sequester and apply for the benefit of all New York creditors of the estate assets physically within the State of New York.

The case at bar had no such object. The distinction between the two is accentuated in *Hill* vs. *International Products Company, et al.*, 198 App. Div., 591, 594:

> "The fact that there are assets of the estate in this state does not give the court jurisdiction of this action. The purpose of the action is not to compel an administration of these assets here, nor to impress a trust or an equitable lien upon them. It is, therefore, not an action *in rem* or affecting the *res*, as was Holmes vs. Camp, 219 N. Y., 359. The action has nothing to do with the estate or its administration. It is solely to establish so far as this defendant is concerned, the liability of Theodore N. Vail's executor for the acts of the testator."

The equitable jurisdiction of the State court in the Thorburn case rested on events transpiring *after* the death of Gates—one of which was the presence of assets of Gates in New York when the suit to administer them was begun. Whatever might have been the situation in that regard, *when* Gates *died*, if there had been no assets in New York when the said action was there begun, there would have been no *res* of which the court could have taken jurisdiction. Assets in New York, refusal by New

Jersey executors to take out ancillary letters in New York, and the impossibility of otherwise securing administration of those assets in New York, would have justified an equitable action to administer them. These essential features of the equitable action must have been alleged and proven in such a suit. Their failure to transpire would forbid the idea of a proceeding *in rem.*

In a blanket statement upon page 15 of their brief, several cases are cited as being "kindred in character with the case now before the court." Analysis shows otherwise.

Peaslee vs. *Peaslee,* 147 Mass., 171, was a consolidation of two original actions, one brought by the widow of Hiram Peaslee for dower against his devisees; the other for an injunction restraining said widow from prosecuting her action at law. The defense of the devisees to the first action and their petition in the second action, was based upon an alleged irregularity in a divorce obtained by the widow from her former husband (Rowe), prior to her marriage to Peaslee. Rowe had been served with the necessary papers in the divorce action and an interlocutory decree was granted. Four years later, a petition was filed to make the decree absolute, which petition was granted without any notice of the application being served upon Rowe. It was contended that the court did not have jurisdiction to grant the final decree without notice to Rowe. The court held that the papers served in the original cause were sufficient to give the court jurisdiction to enter the final decree without further notice to the defendant. It is obvious that this case dealt with the question of the jurisdiction over the same living person who had appeared in the original action, a situation quite different from ours.

In *White* vs. *White,* 65 N. J. Eq,, 741 (incorrectly cited by petitioner), the parties were divorced in Oklahoma. The wife later brought a bill in New Jersey for the maintenance of their children. The father appeared and it

was decreed that he should pay a certain amount, with leave granted the wife to apply for an increase at the expiration of one month. This application was made, but in the meantime the husband had become a resident of Pennsylvania. Notice of the application was served upon him without having procured a special order as required by the New Jersey courts. This defect was later remedied, and the court held that the original jurisdiction was sufficient to warrant a decree extending the allowance. This was another case of a living defendant. *Nation* vs. *Johnson,* was cited merely to point that service of interlocutory papers may be made in another jurisdiction when the parties served were originally before the court.

In *Elsasser* vs. *Haines,* 52 N. J. Law, 10, 19, the defendant was sued in New Jersey upon a recognizance entered in Pennsylvania. His defense was that he had never been served with process in the original action in which he bound himself to pay the sum recovered against the defendant therein. The court held that by voluntarily becoming bound upon the *fieri facias* issued against the defendant in the Pennsylvania action, jurisdiction over his person was obtained by the courts of that state. Again a living defendant.

In *Fitzsimmons* vs. *Johnson,* 90 Tenn., 416, certain executors appeared before the Probate Court of Ohio and obtained a judgment confirming a settlement of their accounts and discharging thereon. The executors then removed to Tennessee. A legatee obtained a reversal of the Ohio judgment in the Appellate Court, which remanded the cause to the Probate Court, where, upon a re-settlement of the accounts, a large balance was directed to be distributed. The executors had not appeared in the Appellate Court or in the Probate Courts after the cause was remanded, and, set this up as a defense to the Tennessee action. It was held that the original jurisdiction acquired was sufficient to settle the controversy regardless of the failure of the executors to appear. Once more, living defendants.

In *Logan* vs. *Greenwich Insurance Company,* 144 App. Div., 372, the action against the administrators of the deceased was *in rem* since certain property within the jurisdiction was attached prior to the institution of service by publication. As respondent concedes that jurisdiction *in rem* can be obtained over a non-resident executor, that case is of no value to petitioners.

In view of the above analysis, we submit that petitioners' statement that those cases are "kindred in character" with the present case is unwarranted and misleading.

Under subsection 6, page 25, of petitioners' brief, several cases are cited in support of the contention that the action may be maintained to prevent a failure of justice. We briefly comment on these citations.

McNamara vs. *Dwyer,* 7 Paige, 239, was an action to compel a foreign executor to account for trust funds *which he had brought into the State of New York.*

The case is distinguished on that ground in the *Webb* and *McGrath* cases, *supra* (98 App. Div., 293).

In *Colbert* vs. *Daniel,* 32 Ala., 314, the foreign executor moved into Alabama without having settled his accounts in Georgia. Apparently moved by this fraudulent evasion of his obligations in Georgia, the Alabama court proceeded without a settlement. In any event, it is but another case of a living defendant.

In *Bergman* vs. *Lord,* 194 N. Y., 70, the action was maintained only because of and in so far as it related to property within the State of New York.

The same is true of *Montgomery* vs. *Boyd,* 78 App. Div., 64.

Holmes vs. *Camp,* 219 N. Y., 359, was an action *in rem* and applied only to property located within the jurisdiction. It was so distinguished in *Hill* vs. *International Products Co.,* 198 App. Div., 591, 594; affirmed, 232 N. Y., 592.

Gould vs. *Gould*, 122 Misc., 152, was decided before Section 160 was declared unconstitutional by the Court of Appeals. It is of no value to petitioners.

In none of these cases is it held that an action *in personam* will lie against a foreign executor. Moreover, some of them disregard entirely the distinction between an action *in rem* and *in personam*, thereby failing to meet the real problem. This feature was obscured by the manner in which quotations were selected in petitioners' brief.

The statement contained in subsection (4) pages 16-17, need not be contested by respondents, hence the cases cited thereunder are unimportant.

No Material Distinction Between Executors and Administrators.

Under subsection (5), page 20, petitioners, at great length, attempt to sustain the proposition that the rule preventing the revival of an action against foreign administrators should not apply to foreign executors. None of the cases which they have cited support the proposition other than indicating in the quotations taken therefrom that an executor derives his power from the Will, while an administrator is an officer of the sovereignty. While this points out the distinction, it does not follow that jurisdiction can be acquired with greater ease over executors. The latter may not any more than the former function without letters testamentary, which are issued to them by the court in which the Will is probated. Both alike administer under the direction and control of that court.

Undoubtedly the testator delegates a function to one nominated by him to the office of executor. But the nominee could not gain legal recognition by assuming to act with a mere copy of the Will in his possession, i. e., without the probate of the Will in the proper jurisdic-

tion and without qualifying in the court that probated the Will. In addition to the nomination by the testator, it requires the judicial confirmation to bring the representative function into legal existence. Wherefore, the representative power cannot pass beyond the judicial limits of the confirming authority.

The reasoning making the rule applicable as to executors is found in McMaster vs. Gould, 240 N. Y., 379.

The Limitation Feature:

Alarm is expressed as to the possible action of the New Jersey courts under the statute of limitations of that state. No particular statute is referred to, nor is it indicated what sort of statute would operate to bar a right to have accounting of a trustee (Syndicate Manager).

Whether such alarm be well founded or not, it should not be seriously considered as making for a power otherwise non-existent. As executors "are called upon to administer and must administer the estate according to New Jersey laws," it would seem clear that the creditors and distributors of Gould are entitled to have his estate in New Jersey distributed according to the laws of that state, whatever they may be.

It would seem equally clear that any proceeding preventing this *would necessarily operate to deprive them of their constitutional rights.* One of those rights is to have this claim of petitioners determined as to its validity by the laws of New Jersey. So that, if there is any difference in limitation between New York and New Jersey, the suggestion would make against rather than for the claim of petitioners.

On the other hand, if there were assets in New York, creditor claimants there might have them administered for their benefit under the laws of New York in a proper proceeding begun for that purpose.

Little sympathy need be felt for suitors who, having begun an action in 1910, allowed it to lie fallow in the courts of New York for at least eleven years before actively starting to carry it to judgment.

The Argument of Inconvenience.

There is no force in petitioners' suggestion that the application of the principle invoked by respondents would subject petitioners to the inconvenience of having to sue in distant lands. Whenever local jurisdiction is denied because the proceeding is *in personam*, this is a usual consequence. That circumstance was never successfully urged to prevent the application of the principle of *Pennoyer* vs. *Neff*.

If a resident of New York contracted with forty-seven different persons, each residing in a different state, it would not strengthen a claim that New York had jurisdiction over all forty-seven, alleged to have breached the contract, to urge that otherwise forty-seven different suits must be instituted in each of the forty-seven different States of the Union. That consequence of the lack of jurisdiction would not be an argument for jurisdiction.

The rule urged by respondents produces a workable comity, permitting each state to control the general administration of the estates of its own citizens. If it be held that, however much the action may sound *in personam*, upon the death of a defendant it may be revived and prosecuted against his foreign executor, the greatest confusion would ensue. Should the New York courts in this action adjudge the New Jersey executors of George J. Gould indebted in a fixed sum on account of his actions as a Syndicate Manager; should that judgment be filed in the Orphans Court of New Jersey as a claim against the New Jersey estate, and, after disallowance, be sued on in New Jersey, it might be claimed that it was a judgment entitled to full faith and credit in

New Jersey. That contention, if successful would allow the New York courts in effect to administer the New Jersey estate of George J. Gould. For, if the judgment were large enough, it would appropriate all the assets of the New Jersey estate to satisfy a claim never passed on by the courts of New Jersey, and established only by those of New York.

On the other hand, if it were held in New Jersey that the New York judgment did not conclude and that a defense on the merits could be made by the executors in New Jersey, and if a judgment for costs, or on counterclaim, were rendered in favor of the New Jersey executors and carried into another State, where an adversary resided who had died after judgment, and if it were sought to enforce such judgment in the latter State, here again it might be urged that the New Jersey judgment must be given full faith and credit in the other State, with a like consequence if the contention were upheld.

The true rule must be as follows:

A money liability of George J. Gould, however arising, whether in suit or not at his death, must be presented as a claim against his estate in New Jersey. If established, it would then become a liability of the New Jersey estate; and, as such, entitled to participation (in its proper class) in the proceeds of the assets of that estate.

If the New Jersey courts should deny the alleged liability of George J. Gould, it would be legally non-existent and unenforcible in New Jersey as a claim against his New Jersey estate, regardless of what the New York courts might say about it. On the other hand, New York courts of equity might sequester and administer assets of George J. Gould, if any, found in the State of New York, to protect New York creditors. But this power would be exhausted with the application of the New York assets.

CONCLUSION.

The determination of the highest court of New York refusing to compel the New Jersey executors of Gould to submit to substitution in this action, was rightful. It invaded no constitutional right of petitioners.

Petitioners' application for a reversing mandate should be denied.

W. WALLACE, Jr.,
Respondents' Counsel.

Office Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1927.

No. 85.

HENRY W. McMASTER and FRANCIS H. SKELDING, as Receivers of the Wabash Pittsburgh Terminal Railway Company,

Petitioners,

against

GEORGE J. GOULD; KINGDON GOULD and SCHUYLER NEILSON RICE, as Executors of the Estate of George J. Gould, deceased,

Respondents.

ON ORDER TO SHOW CAUSE WHY THE WRIT OF CERTIORARI HERETOFORE GRANTED IN THIS CASE SHOULD NOT BE DISMISSED FOR WANT OF JURISDICTION.

BRIEF FOR RESPONDENTS KINGDON GOULD AND SCHUYLER NEILSON RICE, AS EXECUTORS OF THE ESTATE OF GEORGE J. GOULD, DECEASED.

WILLIAM WALLACE, JR.,
Respondent's Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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Supreme Court of the United States

No. 85, October Term, 1927.

Henry W. McMaster and Francis H. Skelding, as Receivers of The Wabash Pittsburgh Terminal Railway Company,

Petitioners,

vs.

George J. Gould; Kingdon Gould and Schuyler Neilson Rice, as Executors of the Estate of George J. Gould, deceased,

Respondents.

On order to show cause why the writ of certiorari heretofore granted in this case should not be dismissed for want of jurisdiction.

BRIEF FOR RESPONDENTS KINGDON GOULD AND SCHUYLER NEILSON RICE, AS EXECUTORS OF THE ESTATE OF GEORGE J. GOULD, DECEASED.

Statement.

The order allowing certiorari in this case was entered October 18, 1926. The writ was duly argued in October, 1927, after submission of briefs; and on January 9, 1928, this Court entered an order to show cause why the writ should not be dismissed for want of jurisdiction "on the ground that the decree sought to be reviewed in this Court

is not a final decree within the meaning of Section 237 (b) of the Judicial Code, in that it appears that Myron T. Herrick, one of the defendants, has appeared and answered the bill of complaint, and that the cause is still pending as to the said Myron T. Herrick in the Supreme Court of the State of New York, and therefore has not been finally and completely determined."

Supplemental Statement.

This action was begun in the Supreme Court of New York in September, 1910 (Record, page 22, fol. 32a). Briefly stated, the complaint (Record, page 22, fol. 32b) alleges that the four defendants, George J. Gould, Joseph Ramsey, Jr., Myron T. Herrick and James Hazen Hyde, were Syndicate Managers of the Pittsburgh-Toledo Syndicate, and on May 9, 1904, submitted an offer to The Wabash Pittsburgh Terminal Railway Company, which offer was thereafter duly accepted; that under the contract so made the defendants received certain moneys, which they neglected to apply and pay over to the Terminal Company, as provided in the contract, and an accounting is asked for such moneys.

Of the four defendants, Gould and Herrick filed their answers and appeared at the trial before Mr. Justice Finch. The action was not prosecuted as against Ramsey and Hyde; Hyde was not served with process and Ramsey died some time ago (Record, page 20, fol. 28). It appears from the record that the issues were submitted for trial before Mr. Justice Finch (Record, page 8). Prior to a decision by Mr. Justice Finch, he was assigned to the Appellate Division of the Supreme Court, and thereby was automatically

disqualified from taking further action. A mistrial resulted. Attempts have been made to retry the case, but no retrial has yet been had (Record, page 15).

Thereafter, on May 16, 1923, the defendant George J. Gould died (Record, page 65). The petitioners, plaintiffs in the New York action, have sought, by various motions in said action, to join as defendants therein the respondents Kingdon Gould and Schuyler Neilson Rice, as executors of the estate of George J. Gould, deceased.

The action in the Supreme Court for an accounting against the four Managers of the Syndicate, and in which Herrick has appeared and answered, is still pending, untried, for determination of the liability of Herrick.

The following statement of the proceedings taken by the petitioners to join the respondents as defendants in the New York action will show that the orders that have been entered by the Court of Appeals and the Appellate Division, and to review which the petitioners prayed for a writ in this Court, were not final decrees or judgments of the highest courts of New York finally determining the action brought by the petitioners:

On December 24, 1923, petitioners secured an order of the Special Term, Part III, of the Supreme Court of New York to show cause why respondents should not be substituted as defendants in place of their deceased testator. Appearing specially and solely therefor, respondents moved to vacate the above order and the service thereof. On February 13, 1924, their motions were denied, and their substitution ordered by the Special Term.

Respondents appealed from that order to the Appellate Division of the Supreme Court, which on July 2, 1924 (210 App. Div., 806), reversed the Special Term, set aside the

order of substitution, and dismissed the order to show cause, on an (adopted) opinion in *Rogers* v. *Gould*, 210 App. Div. 15.

On September 11, 1924, petitioners appealed as of right from the last named order of the Appellate Division to the Court of Appeals. On October 10, 1924, they applied for and secured leave of the Appellate Division to appeal on certified questions.

On January 21, 1925, the Court of Appeals without opinion affirmed the decision of the Appellate Division. Before the remittitur went down, and on April 1, 1925, an Act of the legislature of New York was passed amending Section 160 of the Decedent Estate Law.*

On April 14, 1925, *because of this new statute,* petitioners moved for a reargument in the Court of Appeals. On May 12, 1925, their motion was granted. After reargument, and on July 15, 1925, the Court of Appeals rendered its decision affirming the Appellate Division (Record, pages 82-86; 240 N. Y. 379).

On October 9, 1925, petitioners began a second proceeding in the Special Term of the Supreme Court, by a second order to show cause (Record, page 6, fol. 8). On October 24, 1925, respondents, again specially appearing, moved to vacate this order and service (Record, page 59); which motion on November 2, 1925, was granted by the Special Term on the authority of the above decision of the Court of Appeals (Record, page 86, fol. 74).

On January 29, 1926, the Appellate Division unanimously affirmed the above order of the Special Term (Record, page 88, fol. 76). Thereupon petitioners moved the Appellate

* This Act (Chap. 253, Laws, 1925) is the one on which the proceeding here sought to be reviewed was based.

Division for leave to appeal to the Court of Appeals from the last named order. Leave to so appeal was denied by the Appellate Division on February 11, 1926 (Record, page 88, fol. 78). A copy of this order was served on the attorneys for petitioners on February 20, 1926.* By notice dated three days after this service (February 23, 1926), petitioners then undertook to appeal as of right to the Court of Appeals (Record, page 89). That appeal was dismissed by the Court of Appeals, without opinion, on May 14, 1926 (Record, page 1, fols. a and b; 242 N. Y. 604, 152 N. E. 446).

On May 28, 1926, and on remittitur from the Court of Appeals, its order of dismissal was entered as the order of Special Term, Part II of the Supreme Court (Record, page 91).

The petition herein was filed in the office of the Clerk of this Court, July 1, 1926.

ARGUMENT

POINT I.

There has been no final determination of the action brought by the plaintiffs against Gould, Ramsey, Herrick and Hyde, and such action is still pending as to Herrick in the Supreme Court of New York.

The record shows clearly that the action was brought against the four defendants above referred to, Gould, Ramsey, Herrick and Hyde (See Caption of Notice of Appeal,

* This fact does not appear in the record filed here by petitioners. Under the practice, admission of service is taken on the copy served and the latter is retained in the serving attorney's office. An affidavit identifying a photostat copy of the served order has been lodged with the Clerk of this Court as proof of such service.

Record, page 2, fol. 1; and the Complaint, pages 22-23, paragraphs Second and Third). This also appears from the several pleadings and papers printed in the papers on appeal to the Court of Appeals, filed with the original petition for writ of certiorari herein.

The defendants who appeared in the action were Herrick and Gould.

The affidavit of James Marshall (page 20, fol. 28 of the Record) states:

> "The defendant Herrick is a resident of the State of Ohio; the defendant Ramsey died sometime ago, and I am informed and believe was a resident of Pennsylvania at the time of his death; the defendant Hyde was never served with process herein, and this action has not been prosecuted against these two."

It further appears that the defendant Herrick appeared and answered, since there is included in the Record (at page 57) an excerpt from the amended answer of Myron T. Herrick, one of the defendants.

In the petition for the writ of certiorari herein, page 7, petitioners state that the only surviving defendant is Myron T. Herrick.

Since the mistrial before Mr. Justice Finch, no further trial or proceedings have been had in the action, other than the proceedings for the joinder of the respondents as defendants.

So that it clearly appears from the record that the cause of action, originally brought by the petitioners, is still pending in the Supreme Court of the State of New York as to Myron T. Herrick, and has not been tried, and no

judgment finally and completely determining said action has ever been entered, and that the orders of the Appellate Division and the Court of Appeals here involved are not final judgments or decrees of the highest courts of the State of New York determining the cause of action.

The motion for the substitution of the executors of George J. Gould is incidental to the prosecution of the accounting action instituted by the petitioners against the four defendants, Gould, Herrick, Ramsey and Hyde, and is not a separate action or a special proceeding. This motion cannot result in any final judgment or decree within the provisions of Section 237-B of the Judicial Code.

Under the Civil Practice Act of New York, Sections 84 and 85, the substitution of the executors of a plaintiff or defendant who dies after the institution of an action is made upon motion. These motions take the place of the remedy of the bill of revivor under the old equity practice. See *Jones* v. *Jones,* 68 App. Div. p. 5, p. 11. Sections 84 and 85 did not, however, authorize the joinder of foreign executors. The motion to join the respondents as defendants, was based upon Chapter 253 of the Laws of New York 1925. This statute provided that *upon motion,* a foreign executor or administrator may be brought in and substituted in place of the decedent. The Act reads, in paragraph 2:

> "An action or proceeding pending in any court of this state in which the court shall have obtained jurisdiction of the person of a defendant or respondent who is domiciled in any other state, territory or district of the United States or in any foreign country shall, if the cause of action survives, not abate by reason of the death of such defendant or respond-

ent, but his executor or administrator duly appointed in such state, territory or district of the United States or foreign country, shall, upon application of the adverse party, and upon such notice as the court may prescribe, be brought in and substituted in the place of the decedent and the action or proceeding shall continue."

The application made by the petitioners for the joinder of the respondent as party defendant was merely a motion in the accounting action and was not a special proceeding. The New York Civil Practice Act distinguishes between a motion and a special proceeding. (See Sections 5, 113 and 127 of the New York Civil Practice Act.)

Fiero on Particular Actions and Proceedings (4th Ed. 1922) p. 3095, distinguishes between actions, special proceedings and motions as follows:

> "An action is defined as an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, and it then declares that 'every other remedy is a special proceeding'. A remedy which is not an action, is generally a special proceeding. The word 'proceeding', when standing alone, has no technical legal meaning. The term 'special proceeding' was employed in the Revised Statutes and was evidently intended to designate all those proceedings which could not with propriety be classed in the ordinary proceedings in an action. In such sense they are properly designated as special, that is, out of the ordinary course. * * *
>
> "5. *Motion contrasted.* A motion and an order are defined in sections 113 and 127 of the Civil Practice Act. An order is the direction of the Court or

> judge made in an action or special proceeding, and the application for such order is a motion. This indicates the characteristic which distinguishes a motion as an application in a proceeding, namely, that a motion is an application in a proceeding by action or otherwise already pending, or about to be commenced, upon which it depends for jurisdiction, whereas the special proceeding is an independent prosecution of a remedy in which jurisdiction is obtained by original process. A special proceeding is the prosecution of a remedy by original process, and independently of any other proceeding, which is opposed to the definition of a motion."

Habeas corpus, mandamus and prohibition, which are specially provided for by the Civil Practice Act, are illustrations of special proceedings.

The proceedings by the plaintiff to join the respondents as defendants were clearly interlocutory motions in the accounting suit, reviewable upon appeal from the final judgment. *Perkins* v. *Fourniquet,* 6 How. 206.

By brief just served on us, in compliance with the order of this Court of January 9, 1928, petitioners in trying to show that they have a final judgment here for review, argue that their proceeding against the foreign executors of Gould, though ancillary to the old action, is a new and separate proceeding; and that as such it may have its own finality, apart from the main action.

In all their previous argument to this Court they have claimed that they were but seeking to continue against his foreign executors the New York action pending against him at his death; that the constitutional right which they assert was denied them, was the right to do this; and that

(though dormant at death), this right was made available by the Act of 1925.

By such argument they sought to distinguish some of the decided cases denying a right to so compel foreign executors, as being cases in which there was no suit pending at death, i. e., as involving an effort to sue anew, rather than continue an old action.

Indeed, to get the benefit of the Act of 1925, they had argued that it merely affected procedure in a pending action, and that we had no vested right to any existing procedure in an action; and again that, because of other statutes of New York, the procedural advantage, which they said was given them by the Act of 1925, could not be taken away by the latter Act of 1926.

If, as they now argue, their efforts compulsorily to bring in the foreign executors constitute a new and separate proceeding, then, because not authorized until about two years after Gould's death, what becomes of their attempted distinction of the cases? For, whether it be by new suit begun after death against the executors, or by a new and separate proceeding for revivor, the subject matter to be established in each case is the self-same alleged personal liability of the deceased. A trial, if one should be had, would be of that issue and in that action, and the judgment would be on that issue alone.

On their present argument, the attempted distinction of the cases fails. None should be made as between a right to first sue after death and a right to begin an alleged new proceeding begun two years after death on a statute also enacted after death.

Moreover, upon the argument now made, what becomes of their alleged constitutional right to carry on against

foreign executors in the action pending at death? If, as before argued, they were but trying to continue the old action to finality, then beyond dispute there has been no final judgment therein. Under their former theory, their alleged right was born of and a concomitant of the old action, having no existence apart from it and *always* present and involved in it. If, on the other hand, as they now claim, they are prosecuting a new and separate proceeding to revive the old cause of action—a proceeding not authorized at his death, nor if at all until two years after the death of Gould—then they fail to show a deprivation of any constitutional right existing under the old action and before, at and/or after death.

If this motion was a separate action, the respondent executors could have removed the cause to the Federal court, there being a diversity of citizenship. Certainly no court would support a claim that this motion for substitution of parties made in the original accounting suit was a separate controversy or proceeding removable by the executors to the Federal court.

POINT II.

An action cannot be brought to this court by writ of error or certiorari in fragments. "To be appealable the judgment must be not only final but complete."

See *Collins* v. *Miller*, 252 U. S. 364, 370.

The reason for the rule is stated in *Holcombe* v. *McKusick*, 20 How. 586, 589, as follows:

> "It is the settled practice of this court, and the same in the king's bench in England, that the writ

> will not lie until the whole of the matters in controversy in the suit below are disposed of. The writ itself is conditional, and does not authorize the court below to send up the case, unless all the matters between the parties to the record have been determined. The cause is not to be sent up in fragments."

In *Oneida Nav. Corp.* v. *Job & Co.*, 252 U. S. 521, there was a libel against a vessel for damage to cargo. The owner denied liability and filed a petition to bring in another party as indemnitor. The petition was dismissed. The owner appealed from the order of dismissal. This Court dismissed the appeal, holding that the decree dismissing the petition was not appealable in advance of a determination of the main issue respecting the owner's liability. Referring to Section 238 of the Judicial Code and the jurisdiction of this Court thereunder, Mr. Justice Brandeis, writing for the Court, said (p. 522):

> "The petition to make W. & S. Job & Co., Inc., (indemnitors) party defendants was merely an incident in the progress of the case in the District Court. The liability of indemnitors thereby sought to be enforced would in no event arise unless the vessel should be held liable. The petitioner (owner) had as claimant denied liability in its answer to the libel and the issue thus raised had not been tried. While the decree dismissing the petition as to W. & S. Job & Co., Inc., was final as to them, there was no decree disposing of the case below. A case may not be brought here in fragments. This court has jurisdiction under Sec. 238 of the Judicial Code, as under other sections, only from judgments which are both final and complete."

This decision is clearly analogous with the case at bar. Here the writ brings up for review an order denying the application of petitioners to join the respondents as parties, although there was no decree or judgment finally disposing of the action below.

In *Arnold* v. *Guimarin & Co.*, 263 U. S. 427, the action was brought on a contractor's bond by a creditor under the Federal Materialmen's Act. Under the statute all claims under the bond are to be presented in a single action in which every claimant may intervene and be heard as a party, and the action is to proceed as a single case. The Circuit Court of Appeals affirmed the District Court in holding that the action was not premature and should be sustained for the benefit of the plaintiff and other intervening creditors and that defendants were liable for the amounts found to be due to plaintiff and such additional amounts as may be found to be due to the other intervening creditors. However, the case was remanded for a jury trial of the claims of intervening creditors and thus it did not settle the total amount of the claims to be allowed against the bond or the share of each creditor if the bond proved inadequate. This court held that this was not a final adjudication of the case, although it did definitely settle the rights of the plaintiff. Mr. Justice Sanford, writing for the Court, said, at page 434:

> "It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete; that is, final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction."

In *Hohorst* v. *Hamburg-American Packet Co.*, 148 U. S. 262, an action was brought for infringement of patent against a foreign corporation and various individual citizens of the United States. The foreign corporation demurred to the complaint and thereafter the complainant was allowed to amend. The amendment consisted of an allegation that all of the defendants had cooperated and participated in the infringement. After the amendment the foreign corporation moved for a final hearing upon the complaint and demurrer and that its general appearance be changed to a special appearance and that the service of the subpoena be set aside and the complaint be dismissed for lack of jurisdiction. This motion was granted and the complainant appealed to this Court. This Court dismissed the appeal, holding (p. 264):

> "So far as appears from the record, the suit is still pending and undetermined as against the codefendants of the Company. We are of the opinion, therefore, that this appeal cannot be maintained because the decree rendered in favor of the Company was not a final decree."

The court observed at page 266 of its opinion, that the complainant insisted by the amended bill that the alleged liability was joint and that all the defendants cooperated and participated in the infringement. But clearly, although it was alleged in the bill that the liability was joint, the liability for infringement of patent is joint and several. See *International Radio Telegraph Co.* v. *Atlantic Communication Co.*, 290 Fed. 698, 703.

In *Frow* v. *De La Vega*, 15 Wall 552, a bill in equity had been filed against thirteen defendants charging eight with a joint conspiracy to defraud plaintiff out of a large tract of

land. The defendants other than Frow filed answers to the bill on the merits. Frow's answer was delayed and a decree *pro confesso* was taken against him and subsequently a final decree was entered against Frow which adjudged the title to the land to be in the complainant. An appeal was taken by Frow from this decree. After the final decree, the court proceeded to try the issues made by the answers of the other defendants and decided the merits against the complainant and dismissed the bill. This Court held upon the appeal that the court below could not lawfully make a final decree against one defendant on the merits while the cause was proceeding undetermined against the others. Mr. Justice Bradley, writing for the court, said:

> "If the court in such a case as this can lawfully make a final decree against one defendant separately, on the merits, while the cause was proceeding undetermined against the others, then this absurdity might follow: there might be one decree of the court sustaining the charge of joint fraud committed by the defendants; and another decree disaffirming the said charge, and declaring it to be entirely unfounded, and dismissing the complainant's bill. And such an incongruity, it seems, did actually occur in this case. Such a state of things is unseemly and absurd, as well as unauthorized by law.
>
> "* * * the defaulting defendant has merely lost his standing in court. He will not be entitled to service of notices in the cause, nor to appear in it in any way. He can adduce no evidence, he cannot be heard at the final hearing. But if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all defendants alike—the defaulter as well as the others. If it be decided in the complainant's favor, he will then be entitled to a final decree against all."

It will be noted that the action in *Frow* v. *De La Vega, supra,* was in equity and that although a joint fraudulent conspiracy was charged, the liability was joint and several. In the present case the liability, if any, is based upon a joint contract made by the original four defendants as Syndicate Managers of the Pittsburgh-Toledo Syndicate, and even though the action was brought in equity and assuming (for argument only) that the liability is joint and several (rather than joint), under the principles of *Frow* v. *De La Vega, supra,* a final decree in the action cannot be rendered until after trial against Herrick and a determination of the rights of the petitioners.

In the Matter of Cutting, 94 U. S. 14, it was held that no appeal lies from an order denying leave to intervene, since such proceeding is "only a motion in the cause and not an independent suit in equity appealable here".

In re Atlantic City Railroad Co., 164 U. S. 633, the petitioner company had demurred to the complaint which alleged that it and its president had infringed certain letters patent belonging to complainant; the demurrer raised a question as to the jurisdiction of the court. The demurrer was overruled. The petitioner applied to this Court for mandamus to the Circuit Court commanding it to dismiss the bill as to the petitioner. In the application for mandamus the petitioner alleged that if it was required to answer in the action it would be held to have waived all objection to the jurisdiction of the Circuit Court. This court denied the petition for mandamus holding that the question was reviewable only upon appeal from the final decree. It was also held that the objection to the jurisdiction of the court raised by the demurrer was not waived by answering on the merits.

The decision of this court in *Clark* v. *Matthewson*, 12 Pet. 164, is clearly distinguishable. There one Wetmore, a resident of Connecticut, filed a bill for an accounting against several residents of Rhode Island. There was a reference to a Master to take the account and before the report was made Wetmore died. One Clark, a resident of Rhode Island, was appointed administrator and he filed a bill to revive the suit. The Circuit Court dismissed the bill of the revivor for want of jurisdiction on the ground that Clark was a resident of Rhode Island. Clark appealed to this Court from a decree dismissing the bill of revivor. The dismissal of the bill of the revivor by Clark operated as a final determination of the accounting action, since there was no complainant to prosecute the action. After the dismissal, there was a final determination of the accounting suit. In the present case the denial of the application to join the respondents as defendants does not determine the action. The action is pending as to Herrick.

The decisions in which final orders in mandamus and prohibition proceedings were reviewed by this Court are not in point since such proceedings are separate special proceedings brought for the purpose of obtaining extraordinary writs which operate as a final judgment or decree of the special controversy involved.

POINT III.

The respondents beg leave to renew their jurisdictional objections set forth in Points II and III, and Title Second, pages 5, 7 and 16, of their brief in opposition to petition for writ of certiorari, i. e., that the petition herein was not filed within the time prescribed by law.

POINT IV.

Even if the order of the Appellate Division of January 29, 1926, (Record, page 88) was a judgment or order finally determining an action or special proceeding, petitioners by reason of their failure to apply to the Court of Appeals for leave to appeal from such order, which was the only method under the Statutes of New York to obtain a review of the order by the Court of Appeals, have lost whatever right they had to a review by this court.

(a) Under the laws of New York, even if the order of the Appellate Division of January 29, 1926 (Record, page 88), was a judgment or order finally determining an action or special proceeding, the same was appealable to the Court of Appeals *only* if the Appellate Division certified a question of law to the Court of Appeals, or in case of refusal so to certify, if an appeal had been allowed by the Court of Appeals. The Appellate Division refused to certify. The order of the Appellate Division was not appealable as of right. See subdivisions 1 and 4 of Section 588 of the New York Civil Practice Act, which (in January and February, 1926) read as follows:

"1. An appeal may be taken as of right from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or, having sat in the case, refrains from participating in the decision of the court, or where the judgment or order is one of reversal or modification."

"4. An appeal also may be taken from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding, but which is not appealable as of right under subdivision one of this section, where the appellate division shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals, or where, in case of the refusal so to certify, an appeal is allowed by the court of appeals. Such an appeal shall be allowed when required in the interest of substantial justice."

(b) The appeal by petitioners from the order of the Appellate Division of January 29, 1926, was without authority under the statute and it was for that reason that the Court of Appeals by its order of May 15, 1926 (Record, page 1), dismissed the appeal.

(c) In *Newman* v. *Gates*, 204 U. S. 89 this Court dismissed the writ because of the failure of the petitioners to comply with the statutes of Indiana respecting the proceedings upon the appeal to the Supreme Court of Indiana. The action had been brought against one Gates by three

individuals, Newman, Northrup and Levinson to recover upon a judgment obtained in a state court in Illinois. The defendant counterclaimed. After trial of the Indiana action plaintiffs recovered judgment. An appeal was taken to the appellate court of Indiana, which reversed the judgment and ordered a new trial. The second trial resulted in a judgment for defendant. After the entry of judgment one of the original plaintiffs died. An appeal was taken to the appellate court of Indiana by the surviving partners. The personal representative of the deceased partner was not a party to the appeal. The appellate court of Indiana overruled an objection to the sufficiency of the appeal, and on the merits reversed the judgment and ordered the cause remanded for a new trial. On the application of the defendant, the Supreme Court of Indiana removed the case to that court for decision and subsequently dismissed the appeal, holding that on account of the omission to make the personal representative of the deceased plaintiff a co-appellant, the appeal could not be determined upon the merits. This court dismissed the writ of error, Mr. Justice White writing for the Court saying at page 95:

> "The removal of the cause from the appellate court into the supreme court of Indiana vacated the decision of the former tribunal, and after transfer the case stood in the highest court of Indiana as though it had been appealed to that court directly from the trial court. *Oster* v. *Broe*, 161 Ind. 113. Had the appeal been properly taken it would have been the duty of the supreme court of Indiana to pass upon the questions presented by the record before it, including, it may be, a Federal question, based upon the due faith and credit clause of the Constitution, which, on various occasions, was

pressed upon the attention of the trial court. In legal effect, however, the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court. As the jurisdiction of this court to review the judgments or decree of state courts when a Federal question is presented is limited to the review of a final judgment or decree, actually or constructively deciding such question, when rendered by the highest court of a state in which a decision in the suit could be had, and as, for the want of a proper appeal, no final judgment or decree in such court has been rendered, it results that the statutory pre-requisite for the exercise in this case of the reviewing power of this court is wanting."

(d) In the present case the petitioners, by their failure to comply with the statutes of New York as to the method of obtaining a review of the order of the Appellate Division of January 29, 1926, i. e., by application to the Court of Appeals for leave to appeal, lost their right to a review of the order of the Appellate Division under the decision of this Court in the case of *Newman* v. *Gates, supra* (assuming, only for argument, that the order of the Appellate Division was a judgment or order finally determining an action or special proceeding).

POINT V.

The liability of the defendants, Gould, Herrick, Ramsey and Fitzgerald upon the contract alleged in the complaint was joint and not several, and upon the death of Gould, the liability survived as to the executors, only if the surviving debtor Herrick was insolvent. No such insolvency having been alleged or proved, the liability did not survive and the executors therefore cannot be joined as parties defendant.

(a) The liability of the defendants, as syndicate managers, under the contract upon which the complaint was based is joint and not several. The contract appears in the record (at page 24) and is made by the Pittsburgh-Toledo Syndicate by its Secretary Alvin W. Krech.

In *Jones* v. *Gould,* 209 N. Y. 419, it was held, at page 426, that the obligation of Syndicate Managers upon a contract made by them while acting as managers under a similar Syndicate Agreement was a joint obligation.

We will not discuss at length the provisions of the Syndicate Agreement (appearing at page 30 of the Record) since they are referred to and discussed in the opinion of the Court in *Jones* v. *Gould, supra.*

(b) To bring in as parties the executors or representatives of a deceased joint debtor, insolvency of survivors must be alleged.

Section 85 of the Civil Practice Act of New York provides:

> "The estate of a person or party jointly liable upon contract with others, however, shall not be discharged by his death, and the court may make an order to bring in the proper representative of the de-

cedent when it is necessary so to do for the proper disposition of the matter."

This provision was incorporated in Section 758 of the Code of Civil Procedure of New York, which was superseded by the Civil Practice Act. Section 758 of the Code of Civil Procedure was considered and construed by the Court of Appeals of New York in *Potts* v. *Dounce*, 173 N. Y. 335, 338; and there the Court held that it was necessary to allege and prove the insolvency of the survivors of joint debtors in order to join as defendants the personal representatives of a deceased joint debtor. We quote from the opinion:

> "• • • While this section, by its place in the Code, is applicable to the case of the death of a party pending the action, it must, nevertheless, be regarded as making a material alteration in the law and as imposing a liability where none existed before. (*Randall* v. *Sackett*, 77 N. Y. 480.) *But there is no reason for holding that the section dispenses with the necessity of appropriate averments and proof of the insolvency, or the inability to pay, of the surviving joint debtors, when joining the personal representatives of the deceased debtor as defendants, in an action upon the contract.* The section creates the legal liability; but it does not prescribe the procedure. To hold otherwise would be to lose sight of an essential distinction between the engagement of a joint debtor and that of a joint and several debtor. That remains as it always has been. Upon the death of the former, the survivors become principal debtors and it is then their duty to discharge the obligation assumed; although they would have the right to compel contribution from the estate of the deceased. In this case, the deceased

maker was a joint debtor, and not a mere surety. At common law, her death would have terminated her liability; but, while no action at law could have been brought against her estate, as she was a joint debtor, equity, if an inability to collect from the survivors were shown, would have allowed a recovery against the estate. (1 Parsons on Contracts, 30; *Grant* v. *Shurter*, 1 Wend. 148; *Richardson* v. *Draper*, 87 N. Y. 337.) Section 758 of the Code, now, by continuing the legal liability of the estate of the deceased, enables that liability to be enforced in an action at law. It effects, directly, what, formerly, equity intervened to accomplish. But, while the legal rule of liability has been changed, the rule of procedure is *not and when the personal representatives of the deceased joint debtor are directly proceeded against at law, the plaintiff should, still, allege and prove the insolvency, or inability to pay, of the survivors.*"

(c) Our concession made on page 21 of our brief filed upon the argument of the writ, should have been qualified with the statement that the cause of action herein involved survived against the Executors of Gould only in case of the insolvency of the surviving debtor Herrick.

POINT VI.

All rights of the petitioners to present the constitutional questions which they claim to be involved will be preserved for review by this Court after final judgment has been entered in the action.

After a trial of the action has been had against Herrick and entry of final judgment, the petitioners may pursue their remedies for a review of that judgment by the courts

of New York, and thereafter may apply to this Court for the relief, if any, to which they might be entitled. The petition for a writ of certiorari to review such final judgment by this Court would join the respondents herein as parties. At that time the petitioners may present to this Court the Federal or Constitutional questions which they consider involved in the judgment. This Court under Section 237 (b) of the Judicial Code would then have jurisdiction to grant certiorari to review the questions raised by the petitioners. This Section is quite specific in providing that this Court may by certiorari require that there be certified for review "any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had where is drawn in question * * * the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States * * *".

The mere fact that the respondents are not parties to the final judgment because they were not joined as parties, would not deprive this Court of taking jurisdiction by certiorari under section 237 (b), after final judgment in the New York courts. The petitioners will not have waived any rights by reason of the delay intervening the denial of their motion to join the respondents as parties and the entry of the final judgment. (See *In Re Atlantic City Railroad Co.*, 164 U. S. 633.)

This action has been pending for almost eighteen years. The petitioners since the death of Gould in 1923 have obtained an adjudication of their rights to join the respondents as parties, by the Supreme Court of New York, Special Term, on two separate motions, by the Appellate Division of the Supreme Court on two separate appeals, and by the

Court of Appeals of New York on three separate occasions. The latter proceedings alone have continued for a period of almost five years. During that time no progress has been made in the trial of the merits of the case so far as Herrick is concerned. Respondents respectfully submit that petitioners move promptly for a trial of the case as against Herrick and bring such trial to a rapid conclusion so that there may be a final judgment of the action settling the rights of the parties, and a petitioners' application to this Court will have jurisdiction to review the validity of the statutes of New York upon which the petitioners rely.

POINT VII.

CONCLUSION.

The writ of certiorari in this case should be dismissed for want of jurisdiction upon one or more of the grounds above set forth.

Respectfully submitted,

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